

On the Rights of the Voiceless

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I

As the age of individualism draws to a twilight, we are confronted with new and serious problems in moral analysis. The idea of rights has developed in a context in which face-to-face encounters between individuals were the backdrop; in this situation, the substance of rights and duties was relatively easy to determine—if not through direct communication, then through feedback mechanisms. The understanding of rights deriving from this background was adequate for a time when men had the power, at best, to affect their immediate surroundings. Our sphere of influence today, however, is literally without limit: we are expanding out into space at the speed of light, nor are time capsules destined to be our sole legacy to future generations. This growth in power entails the fact that our decisions and actions affect large numbers of human beings who were previously beyond our power to influence for good or ill: the unborn, future generations, and entire populations of living and yet-to-be-living human beings.

Our ambit of moral concern must and has expanded accordingly. Even the simple act of seeing the effects of our actions has served as a moral constraint in the past; as our experience with high-flying bomber pilots suggests, this modicum of constraint may no longer be relied upon. What substitute moral limits to the exercise of power are available today? How ought we deal with those who cannot tell us how they wish to be treated?

One approach which has emerged from this concern has been the idea that we ought to extend to the unspeaking the same rights as we ourselves possess, or, if this proves impossible (as it quickly does), that we at least model our moral relations with them as closely as possible upon our standard moral relations. This approach has in turn fostered the view that these unspeaking, when given rights, should have the *content* of those rights—the particular duties which those rights entail for others—

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determined by what the possessors of those rights would have told us they want (or, what they would have wanted) had they been available to communicate their demands and desires (or, to have demands and desires). In short, when the voiceless have some moral claim against us, the content of this moral claim is to be determined by what they would have wanted had nature given them the chance to speak. In this way, our moral relationships with them are a simple extension (accomplished by means of a thought experiment) of our standard moral relationships; for, in the standard case, if someone has the right to determine how he is to be acted toward, the content of that right is determined by what the "owner" of the right desires.

The burden of this paper is an examination and rejection of this view, although some general discourse on the nature of rights will be necessary to the accomplishment of this task. Before proceeding further, though, it will be helpful to give an example in which this approach is used and a description of the classes of persons to whom the argument might apply.

II

Consider, then, the guidelines on care of the dying issued by the Swiss Academy of Medical Sciences in November 1976. As is well known, countless dilemmas arise in this area, where prolongation of life is often positively correlated with prolongation of suffering and negatively correlated with respect for the dignity of the dying patient. The Swiss Academy, in treating this problem, has forthrightly declared that the way we ought to treat the dying patient depends upon that patient's informed judgment: "In accordance with the patient's wish, the physician should content himself with administering painkillers or proceeding to some limited treatment, without being rendered liable. The ruling principle should be: 'Let the will of the patient be the supreme law' " (Swiss Academy of Medical Sciences 1977, p. 31). In this situation, the individualist perspective on rights is applicable, and the academy respects it.

But what is to be done when the patient is comatose or for some other reason is unable to communicate with us? The Swiss Academy apparently reasoned that the right, which, after all, is vested in the patient, should follow our construction of what the patient's desires would have been, thus insuring that the way he is treated when comatose corresponds, to the best of our judgment, with what it would have been had he been conscious and coherent. The academy, like all scientists, must see itself extrapolating into the unknown on the basis of known principles in known situations. They write: "If the terminal patient is *no longer capable of judgment* and can thus no longer express his will (for example, in the case of the unconscious patient) . . . the presumed wish of the patient should determine the therapeutic measures. This wish ought not to be interpreted



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situation for examination. Clearly, though, this same view as to how to determine the contents of rights is found in many different areas: in the questions of rights of fetuses and neonates (especially when the relevance of eugenic considerations is injected into the argument); rights of future generations; and rights of individuals in large-scale social experiments, where it is impossible to determine, within reasonable lengths of time, what content each individual affected by the experiment wishes to be given to his rights. The view that the rights of these persons (or persons to be) ought to be given a construction based on what we feel they would have desired had they been asked I call, for short, the hypothetical test. A test so far reaching in its implications ought not to be admitted into the armamentarium of ethicists without a searching examination.

As with anything involving complicated argument, the hypothetical test is easily confused with other positions which bear to it a superficial similarity; again, as with other arguments, when the variants are set side by side with the original argument, the differences are plain. The hypothetical test is concerned with what a person (or group of persons) would have wished if given the opportunity of being confronted with the question at hand. This is easily confused with what the reasonable man would have wished had he been confronted with the question. This appears to be the confusion which the Swiss Academy fell into in allowing the physician to disregard the expressed previous wishes of the patient in the event that the patient would "reasonably have revoked" the declaration, that is, in the event that the reasonable patient would have revoked the declaration.

IV

We have seen two elements in the substitution of the judgment of the reasonable man for the presumed judgment of the individual: the first, an empirical belief that the latter, while more readily ascertainable, is still likely to correspond with the former; the second, a normative belief that we ought to give greater weight to the rational, reasonable side of man's nature than to other hypothetical vagaries of whim.

These two elements in the reasonable-man test make it serve as a conceptual conduit to one of two separate views: (a) the view that we ought to do what this man would have wanted (the hypothetical test), and (b) the view that we ought to do what this man ought to have wanted, because wanting it would be reasonable. If the reasonable-man test is taken as a test with empirical value, one which tells us what any given individual would most likely have done, it will dissolve into position *a*. If it is taken as a normative test to determine what reasonableness, prudence, and good judgment dictate in the situation, it dissolves into *b*. The

reasonable-man test does not, therefore, stand by itself; it serves as a stalking horse for two other tests.

The dynamics of *a* have been examined; while purporting to give empirical guidance, it is unclear whether this is successful, for it is not clear whether any claim made under *a* is falsifiable by any evidence. This problem became apparent in the discussion of the Swiss guidelines. What are the dynamics of *b*?

The normative view is that the judgments of the reasonable man represent the standard to be adopted because there is a special kind of worth—authenticity—to man's reasonable tendencies. It would appear, though, that a yet greater authenticity is to be found when man is not merely averagely prudent and reasonable, but optimally prudent and reasonable. Using the reasonable-man standard as a mediating concept, then, we may find ourselves going by insensible degrees from an empirical construction of someone's wishes to a value construction of what the ideal person would wish—or, in other words, to what a person ought to wish. Richard McCormick (1975) illustrates this instability of the reasonable-man standard when taken as a normatively based rather than empirically grounded test.

The problem with which McCormick was dealing was that of the justification of experimentation upon children too young to give informed consent to medical experimentation. It is generally accepted that at the very least consent given by the child's parents is required; but is this enough? Parents are, indeed, allowed to give proxy consent to therapeutic intervention on behalf of their children, but surely the experimental situation is different. Even if the parents are altruistic, they do not have the right to make martyrs of their children. McCormick thinks he has found the answer:

The heart of my argument is this: if we analyze proxy consent where it is accepted as legitimate—in the *therapeutic* situation—we will see that parental consent is morally legitimate because, life and health being goods for the child, he would choose them because he *ought* to choose them. In other words, proxy consent is morally valid precisely in so far as it is a reasonable presumption of the child's wishes, a construction of what the child would wish could he do so. The child would so choose because he ought to do so, life and health being goods definitive of his flourishing . . . are there other things that the child *ought*, as a human being, to choose precisely because and insofar as they are goods definitive of his well-being? . . . these are things we *ought* to do for others simply because we are all members of the human community. . . . In summary, if it can be argued that it is good for all of us to share in these experiments, and hence that we *ought* to do so (social justice), then a presumption of consent where

children are involved is reasonable, and proxy consent becomes legitimate. [1975, p. 27]

In this passage, put forth by McCormick himself as a *précis* of his position, various distinct methods for determining the content of rights for the voiceless are intricately intertwined, and full analysis of the argument would take pages. The confusion of thought is blatant enough, however, to be handled shortly. McCormick confuses, first, material goods for the child with moral goods (for the child? or for humanity?), and, second, what the child would choose with what the child would reasonably choose with what the child, if moral, would choose. The confusion is valuable for us in showing how easy it is to confuse these concepts: the hypothetical test, the reasonable-man test, and the test of what he would choose because choosing that would be (a) good.

This last is indeed far removed from our starting point. There is not much conceptually in common between what someone wants and what is best for him. A person can want something without it being good for him, without it being in his best interests. In fact, a person can have a right to something because he wants it, though it not be in his best interests to have it (Hume 1888). And, as I shall argue, something can be in someone's best interests though he does not desire it—indeed, we may have a duty to procure some undesired benefit for someone just because it is in his best interests to have it.

In confounding these concepts, McCormick has performed an unwitting service by showing how it comes about that a "best-interests" test becomes confused with the hypothetical test. Once again, the reasonable-man test serves as the mediating concept: we start out with what he would have wanted, then turn to what it is reasonable to presume he would have wanted, then to what he would reasonably have wanted, and then to what he would reasonably have wanted because it is good for him to have.² Each of these steps is logically illegitimate, whatever links we might at some date find through empirical investigation.

In the final analysis, then, we find that there are only two tests in common use for determining the content of rights of the voiceless: the hypothetical test and the best-interest test. The apparently independent reasonable-man criterion dissolves into one of these. A false impression which might arise here must be corrected: both of these tests are in fact test schemata and can themselves sustain varying content. Take the

² McCormick goes one step further than this, to what he would reasonably have wanted because it is good, *simpliciter*. This statement, which I believe is based on a confusion of material goods with moral goods, I will not pursue further.

hypothetical test that you do what he would have done, but there are many ways of determining what he would have done (written documents, feelings of relatives, what the average person in his situation would want, etc.). The particular schema adopted should be, presumably, that which corresponds most closely to what he would in fact have done. Saying this, however, does not help, since the reason these all appear as candidates is precisely because we do not know which is empirically most trustworthy. Similar remarks apply to the best-interest tests. You do what is in his best interests, but how are we to determine what is in his best interests? Through determining his idiosyncratic notion of what is in his best interest, or through some community standard of what is good for a person—and if the latter, which of the communities in which he partakes is relevant?³

V

It is true that these positions represent argument schemata rather than actual arguments. At this level of abstraction each position may only be characterized with a minimum of substantive commitments; we cannot precisely specify, for example, exactly which test should be used in applying the positions. Nevertheless, the schemata can be distinguished and judged between, and for clearness of thought we must distinguish and judge between them. Philosophers have not always done so, however, nor has the law.

The case of *Strunk v. Strunk* (1969) is one interesting example in which the court was faced with deciding whether proxy consent may be given to allow surgical transplantation of an incompetent's kidney into his brother who was dying of end-stage renal disease. The majority, which ruled that proxy consent may be given and hence that the transplantation should proceed, relied upon what appear to be two different rules, which they did not, however, distinguish. The first rule is that the court has the right to order such operations if they are found to be in the best interests of the incompetent. Psychiatric testimony was therefore heavily relied upon by the court, to the effect that the incompetent would suffer serious psychological consequences if he was not permitted to donate his kidney to his brother. The second rule is that the court has the power to allow a proxy consent which corresponds with what the incompetent would have consented to had he been competent. These rules correspond to, respectively, the best-interest test and the hypothetical test.

That the rules may yield different results can be seen from the cases cited in support of the latter rule, which corresponds to our hypothetical

³ My thanks to Professor Irving Ladimer of the American Arbitration Association for drawing this to my attention.

nobody left to whom he wishes to leave money; he may have no responsibilities, no dependents; he may have saved this money precisely as a spendthrift fund for old age; he may wish to secure tax advantages by spending the money; or he may wish to see the money being used. The judge, in contrast, is typically middle aged and with dependents—with, in fact, life prospects and a corresponding attitude toward money entirely at variance with that of the respondent. What seems to the judge foolish spending now may in twenty years come to seem perfectly reasonable.

Tyrell (In re Tyrell 1962), for example, was an elderly man in just this situation: with no surviving wife or children, he had been prudent enough to prepay both nursing-home care until his death and burial expenses. A sister-in-law of his, alarmed at his spending and the consequent diminution of her own prospective inheritance (Tyrell had spent \$9,000 in two years, nearly half his estate, including \$2,000 given to a widow whom he thought "needed it"), brought him to court to be put under a guardianship. She was successful in her claim of incompetency, most of the evidence brought having related to his current spending habits rather than to more standard indicia of psychiatric abnormality.

His behavior may have been bizarre from the judge's standpoint, but was it from Tyrell's viewpoint? Obviously not. Was it bizarre from the viewpoint Tyrell would have had had he been normal? The peculiar thing about this question is that it has only become a question because the behavior seems bizarre from our standpoint, not because we have any serious reason for thinking that Tyrell, in normal times, would not behave this way.

This case, and many others similar to it, show not only the extreme difficulty in trying to determine what a person would have wanted, but also the extreme prospects for abuse held out by the need to make this determination. It is all too easy and cheap to do what we wish to people, disavowing "this function under the guise of sanctifying the integrity and freedom" (see "Note: The Disguised Oppression" 1964, p. 688) of their "true" intent, what they "really" want.

It is not enough, however, to show that there are practical difficulties and dangers in applying the hypothetical test, for these problems and dangers exist in applying the best-interests test as well. Who is to say that this is in his best interests, that this is good for him? In arrogating to ourselves this paternalistic power, do we not open the way to abuses as serious as those involved in the hypothetical test? I believe that the best-interests test, despite its defects, is more easily determinable and hence less given to abuse by well-intentioned judges than is the hypothetical test. And, of course, what a well-intentioned judge would do must be our test; no doctrine can be made foolproof against intent to falsify and cheat. This counterobjection to the best-interests test retains considerable force nevertheless.

Apart from the practical difficulties in application, something basic is wrong with the hypothetical argument, a difficulty which arises at the theoretical level. The problem is, what is the point of doing what a person would have done, in giving his right the content which he would have given it had he been able? What purpose does this serve?

In the ordinary course of events, we give people rights of a certain kind (Golding calls them "option-rights" [Golding 1968]) in order to increase the range of their freedom. Your property right in your car allows you to use the car as you please, free of interference (within, of course, certain boundaries). Your property right allows you, for example, to dump your car into the lake on your property. Is there anything inherently good about disposing of a car in this way? Has the law, in giving you the right to do this, protected what it considers to be a valuable interest of car owners to be allowed to dispose of their cars in their lakes? Of course not.

The point of the right is to enhance and legally protect freedom, which freedom is itself a value, independent of the use to which the freedom is put. There is nothing sacred about the use to which one puts—the content which one gives to—option rights, rights of sovereignty over objects or domains. What is important is that you may do as you wish when freedom is yours as a right.

Option rights have been granted in order that moral claims to freedom might be satisfied. In our acting toward a person as we believe he would have wanted us to act, though, whose freedom are we preserving? Whose desire are we satisfying? Certainly not this person's freedom, nor his desire. If we are speaking of a fetus, or of future generations, there is no person present to have his freedom enhanced or his desires protected. If the case involves an incompetent, by law no account is to be taken of the freedom and desires of such a person.

In short, in doing what he would have wanted we are not satisfying the right at all. Rights involving freedom have been lost to this person or person to be through the intervention of nature. Judged from the point of view of freedom, in acting as he would have done, even if we can be sure we know what he would have done, we have done nothing at all of value, for the value of a right to freedom does not lie in the content given to the right but in the act of exercising the right—an act which is not possible here.

VI

These criticisms having been presented, the question arises as to why the hypothetical test has been popular at all.⁴ The major confusion which it

⁴ One possible support for the hypothetical test should also be noted. It is

trades upon (between the value of free action and the value of the state of affairs which free action may produce) is after all fairly obvious.

One reason for the hypothetical test's popularity we have already seen: a desire to keep our relations with the voiceless in as close an analogy as possible with standard moral relationships. This represents, I think, a yearning for some unified moral field theory. It is not clear, though, what the justification is for this yearning—and yearnings, when they are philosophical, require justification just as much as do prejudices which are philosophical. Why should we want to treat everybody in the same way, in the face of obvious differences between their situations? As I have written elsewhere on the question of the rights of children, "Children are not small adults; our relations with children must not be made to approach as nearly as possible to our relations with adults. . . . A child is (morally) a different sort of thing than is an adult; we must adjust our relations with them according to their claims upon us" (Freedman 1975, p. 38).

What else could have made the hypothetical test attractive? I will examine two other arguments, one based upon the problem of inheritance and wills, the other based upon the moral principle of respect for persons.

Why do we give effect to a will? Is it not because the will expresses how the dead person would have wished to dispose of his estate? If so, is this not an example of the possibility and legitimacy of using the hypothetical test to determine the content of rights?

The example misconstrues the nature of wills, and so is not to the point. Wills are documents expressing the current wishes of a man as to the future disposition of his estate. If we give wills effect—and whether we do or not is a policy decision—we are promising to living people that their legally formulated wishes will be given recognition after their death. We are not saying that we will dispose of their estates as they would have wished: the document of the will is what is given effect, not the wishes. The estate of a man who dies intestate is disposed of in accordance with statute, not in accordance with what we feel the man would have wanted (even though we may attempt to design the statute in such a way that it would correspond to what most men would have wanted). Wills are not a

the currently fashionable consensus among philosophers on the nature of rights, which asserts (or, more often, simply presupposes) a logically or semantically necessary connection between rights and desires (or, between rights and interests, with the proviso that "interests" be explained in terms of desires). It is believed that because rights are necessarily tied to desires, the content of rights must be determined either by reference to desire itself, or to some "function" of desire. I believe this view of rights to be radically false; it is, however, too large a topic to pursue here and will require a separate article.

means of determining what a person would have wanted; they are a means of expressing what a person does want (now) to be done with his estate (later). Even when we try to interpret a will whose purport is unclear so as to correspond with the testator's wishes, we are not making a construction of what he would have wanted but of what he did want but did not clearly express when drawing up the will.

Our granting wills legal effect expresses a policy judgment on our part, and "living wills" should be given effect or not upon policy grounds as well. There is nothing incoherent in the idea of someone now exacting from us a promise as to how we will deal with him later, should he be dead, comatose, or incompetent. The mistake of the Swiss Academy is in thinking that this must be just a means to determining what a person would have wanted, that a living will can only serve in this capacity. Should we decide to give it legal effect, a living will, like an ordinary will or indeed like any contract, can stand by itself as a legally binding expression of a desire at one time for certain things to happen at another time.

The final support for the hypothetical test to be examined here I call the "whole-life view" of human rights.⁵ This view holds that people may establish certain projects for themselves and, in their lifetimes, further these projects by a judicious use of their rights. Respect for persons demands of us that once they become incompetent, or otherwise incapable of speaking for themselves, we carry forth those projects which they had established during their conscious life span. This is the doctrine given expression when we tell the physician that grandmother was always a very self-reliant person and would not have wanted to be kept alive by life-support systems.

I feel the plausibility of this argument more than any other hitherto examined in support of the hypothetical test. I want to suggest, however, that invoking respect for persons has gained for the hypothetical test plausibility in proportion to the unclarity and vagueness it has introduced.

Is it respect for the projects of persons which is required, or respect for the persons themselves? During conscious life, these two may be identical, but can they remain so with the permanent lapse of consciousness? If someone dedicates his life to making life enjoyable for his pets, is that project itself of normative significance, or does the normative significance lie in the fact that he chooses to spend his time that way? I suggest that, just as in option rights, it is the exercise of freedom and not the results of the exercise of freedom that is significant, so here it is engaging in the project, and not the project itself, which respect for

⁵ I am indebted to Dr. Michael Buckner, philosopher resident at University Hospital, New York University, for drawing this point to my attention.

persons enjoins us to support. In our case of the comatose or incompetent, in carrying out what would have been the person's desires we are not engaged in his project but in a mimicry of his project.

With removing this last buttress, I leave the hypothetical test. When dealing with the voiceless, it is both impossible to determine what they would have wanted and senseless to act upon that if we could determine it. Rights extended to the voiceless can, however, be founded upon their interests, what is good for them; and insofar as we can determine what is good for some voiceless individual or group, society may extend them rights. The impulse behind the hypothetical test was laudable—to extend the ambit of our moral sympathies to classes and persons previously unrecognized. This should, however, be done in a reasoned way, without reliance upon faulty moral analysis and analogy.

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Freedman on the Rights of the Voiceless

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In his thoughtful essay, Benjamin Freedman argues that there are only two tests for determining the content of the rights of the voiceless: the hypothetical test and the best-interests test. He further argues that these are totally different tests that yield different content conclusions. He finally rejects the hypothetical test on practical and theoretical grounds, and concludes that the best-interests test is the one that ought to be used where giving content to the rights of the voiceless is concerned. In the process of arriving at this conclusion, he asserts that the two tests have been "confused" through the use of the reasonable-man standard—the reasonable man being one who would, it is assumed, choose reasonably and in his best interests.

Freedman's conclusion (that it is the best-interests test we ought to use) rests on two arguments: (1) the two tests are "entirely distinct" conceptually and in practice can yield different content conclusions; (2) there are grave practical and theoretical difficulties with the hypothetical test. As support for the first statement, he cites the instance adduced in *Strunk v. Strunk* (1969) of an incompetent's estate being diminished in favor of a needy brother and in favor of an elderly servant—the court being "satisfied that the Earl of Carysforth would have approved if he had been capable of acting himself." This is clearly the hypothetical test. But, Freedman argues, in neither of these cases were the actions taken in the best interests of the incompetent. Therefore, clearly the two tests are different.

As support for the second assertion, he notes the grave difficulties and perils involved in attempting to determine what a person would do were he competent. While purporting to give empirical evidence, it is not clear that the hypothetical test does so. But beyond these problems, he wonders theoretically what is the point in doing what a person would have wanted. In doing what he would have wanted, we are not satisfying his right at all, since

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the value of that right is in the subject's freedom, his free exercise of the right. By doing what he would have wanted, we are not satisfying his freedom, nor his desire. The two arguments often used to give plausibility to the hypothetical test (similarity to wills, respect for persons—namely, honoring them by carrying on their projects) he finds unpersuasive. This is how I read Freedman.

In this brief response, I want to argue that Freedman has unduly separated the two tests. While they are distinct schemata or formulations, they are, I believe, closely interrelated. And notwithstanding Freedman, I believe the "reasonable man" (in the normative sense) is precisely the mediating vehicle of this relationship. Those who acknowledge this interrelationship and its bases Freedman accuses of "confusing" the two, and even of "blatant" confusion. We shall have to see about that, but for now let it be said that a close relationship within a distinction is not necessarily a confusion. Second, I want to point to the reasons why he unduly separated the two. And finally, I want to suggest that my own attempt at a normative statement (what they would choose because they ought) of the hypothetical test was precisely an effort to relate these two formulations (hypothetical test, best-interests test). In brief, I want to suggest that it remains appropriate to approach the voiceless in terms of what they would choose because it is in their best interests. This unified formulation attempts to show the close relationship between the hypothetical test and the best-interests test. In the course of making these points, I shall make reference to arguments and analyses where I believe Freedman is incomplete and even inaccurate.

1. Freedman's undue separation of the two tests: As I read him, Freedman offers several reasons for these two tests being "entirely distinct." The first is practical. That is, they can and do lead to different content conclusions. *Strunk v. Strunk* is his example. In that case, the majority supported its use of the hypothetical test (what the incompetent would have consented to) by citing cases involving diminution of the estate of an incompetent to aid an indigent and, in another instance, an elderly servant. In both instances an annuity was allowed on the grounds that the incompetent would have approved (hypothetical test-substituted judgment). Yet in these cases Freedman argues that the actions were not in the best interests of the incompetent. Therefore, since the tests yield different conclusions, they are "entirely distinct."

I have several problems with this analysis. First, it patently equates "best interests" with "getting or keeping something for oneself" or, more generally, with "deriving personal benefit." That equation, when unpacked, is a highly individualistic one and a subtle attack on the social dimension of our persons. As social beings, our good, our flourishing (therefore, our best interests) is inextricably bound up with the well-being of others. That is one reason why, for instance, a long Christian (in this case Catholic) tradition has held it to be morally acceptable for an individual to

forego expensive lifesaving medical treatment if such treatment would exhaust family savings, plunge the family into poverty, and deprive other members of the family of (e.g.) educational opportunity. In such an instance, it would not be in the best interests of the ill individual because his best interests include his family.

Something can be, therefore, in our best interests without we ourselves, precisely as isolated individuals, deriving any benefit or gain in the sense that Freedman uses that term. Another modest example of this is the case where one individual (1) can provide considerable benefit to other(s) (2) at no cost to himself. I believe that if one considers our social being, it is legitimate to say that such provision is in the best interests of the individual. Indeed, that is exactly how I argued when attempting to justify non-therapeutic experimentation on those children incapable of consent. In brief, then, it is only by assuming a very individualistic (and inaccurate) notion of best interests that these interests are different from "what he would have chosen" in the cases cited. I shall return to Freedman's individualism because it surfaces later in dealing with freedom and respect for persons and their projects.

Second, the verdict of the majority in *Strunk v. Strunk* (that the incompetent would have consented to kidney donation had he been competent and that it was in the best interests of the incompetent to donate a kidney) is highly questionable. Indeed, I would agree with the minority that it was not in the best interests of the child. But I would similarly argue that the child would *not* have consented. So the fact that the minority found it sufficient to rebut the claim that the operation would be in the best interests of the incompetent does not mean that the two tests were confused by the court, or that they are "entirely distinct." It simply suggests that the majority was wrong in its application of both interrelated test schemata.

In this context, Freedman has argued that the court used two different tests in *Strunk v. Strunk* (hypothetical, best interests). That is not a necessary reading of that decision. Indeed, in a recent decision, the Massachusetts Supreme Court reads the matter differently (*Superintendent of Belchertown State School et al. v. Joseph Saikewicz* 1977). In reporting *Strunk v. Strunk* (1969) the court stated: "The Court concluded that, due to the nature of their relationship, both parties would benefit from the completion of the procedure, and hence the court could presume that the prospective donor would, if competent, assent to the procedure." Here we see not two different tests, but two interrelated formulations: he would assent because it is in his best interests (benefit).

The Massachusetts Supreme Court adopted this reasoning in deciding the Saikewicz case. It accepted the doctrine of substituted judgment, but insisted that this judgment must be determined by and brought into step with "the wants and needs of the individual involved . . . the values and desires of the affected individual . . . the incompetent person's actual interests and

preferences." "Needs, interests, preferences, wants" are all ways of saying "best interests," as is clear from the Supreme Court's repeated reference to "best interests" when defining the jurisdiction of the probate court in such cases. Thus, in actually deciding the case, the Supreme Court of Massachusetts decided that it was not in Saikewicz's interest, to his benefit, to get chemotherapy, and that therefore he would not have wanted it. In other words, it related the test schemata.

Somewhat similarly, Freedman tries to get leverage against the hypothetical test in the case of the reckless spender declared incompetent. By citing an abusive application of the hypothetical test, or at least a highly questionable one (the questions Freedman raises are legitimate), he attempts to invalidate or at least weaken the test itself—thus further separating it from the best-interests test. But rather than arguing a separation of the tests, the case only illustrates the possible abuse of both interrelated tests.

Therefore, I do not find Freedman's reasons for the total distinction of the tests persuasive. And if they are not distinct as he asserts, but interrelated, then those who acknowledge this close relationship, and use the tests somewhat interchangeably, are hardly "confusing" the two, a claim Freedman repeatedly makes.

If the test schemata are really closely related, as I argue, then I must deal with the grave difficulties, both practical and theoretical, Freedman adduces against the hypothetical test. For if his objections against the hypothetical test are valid, they would argue powerfully against the close relationship I assert between the two.

The first difficulty Freedman asserts against the hypothetical test is practical. "We do not," he says, "in general, have any reason for assuming that we know what he [an incompetent] would have wanted." Written declarations can help, but they do not fall under the hypothetical test. Lacking such a declaration, the "determination of what a person would have wanted is difficult, obscure, and, in fact, fraught with peril" (p. 205).

Since these perils and difficulties apply as well to the best-interests test as he interprets it, they are no reason for separating the two tests or of preferring one test over the other. For in determining what best interests are, it is always a question of our judgment as to what they are. Mysteriously, however, Freedman asserts that the best-interests test is more easily determinable and less given to abuse than the hypothetical test, whose perils and difficulties apply also to the best-interests test as he admits. I say "mysteriously" because he offers no reasons for this statement, and it is crucial if the practical difficulties he raises against the hypothetical test are to count at all toward a separation or preference.

That being said, let me turn to the problems he raises. First, I believe we do have reasons for assuming we know in many cases what an incompetent would want. We may assume that most people are reasonable, and that being such they would choose what is in their best interest. At least this is a

safe and protective guideline to follow in structuring our conduct toward them when they cannot speak. The assumption may be factually and *per accidens* incorrect. But I am convinced that it will not often be. In discussing the Karen Ann Quinlan case throughout the country, I have found a virtual consensus of people on what it would have been morally proper to do once the facts became clear (remove Karen from the respirator). This tells us a good deal about what these people would want were they in the same condition. The court, in the Saikewicz case, admitted that this type of evidence is valuable even if only indirect. That is, it is valuable in pointing to what Karen would want were she competent. For this reason, I believe I would simply have to deny Freedman's statement that "we do not, in general, have any reason for assuming that we know what he would have wanted." In general we have some fairly good reasons for this assumption.

Evidence such as this removes much of the bite (not all) in Freedman's practical problem with the hypothetical test (i.e., that while purporting to give empirical guidance, it is not clear that it is successful). This test should be approached as an approximation only. The question to be put to the test is not whether it is empirically accurate in all cases, but whether it is sufficiently accurate in most cases to provide the basis for a prudent and protective rule of practice. In brief, in the vast majority of cases, the test will not be falsified, and that is sufficient for guidance.

As an example of the practical difficulty in applying the hypothetical test, Freedman gives the case of the reckless spender who is found incompetent. He asks, "How do we judge what he would have wanted in his right mind?" (p. 205). I would answer: by consulting reasonable people. For Freedman, because there is leeway within the reasonable, the very concept seems to be invalidated. We may grant the difficulty in drawing the line distinguishing reasonable from unreasonable spending (indicative of incompetence). But the very fact that one can appeal to incompetence at some point because of spending shows that there is a line we admit between the reasonable and unreasonable in this area. That should be the criterion for both the hypothetical test formulation and the best-interests formulation.

Freedman then argues against the hypothetical test on theoretical grounds. "What is the point," he asks, "of doing what a person would have done. . . . What purpose does this serve?" His answer: none, because in option rights it is the freedom itself which is the value, not the use to which it is put. "There is nothing sacred about the use to which one puts . . . option rights." Furthermore, in acting toward a person as we believe he would have wanted us to act, we are not preserving his freedom.

I think this has to be denied outright. For example, by protecting a dying incompetent person from months on a respirator, I am protecting him against those who would take advantage of his incompetence. I am substituting my judgment and freedom for his and thus supplying for his lack thereof to act in his best interests.

Therefore, to Freedman's question ("What purpose does it serve?") I would say that the closer we can construct his reasonable wishes, the better we protect the dignity of persons. By negating his reasonable wishes, we tend to treat a person as a thing, and hence, by extrapolation, we render ourselves vulnerable to treating others (even competents) arbitrarily and as objects. But Freedman would object: what has reasonableness to do with it? You have intruded the notion. I think not. Perhaps I have more normative instincts than Freedman, but I believe most of us want to act reasonably within parameters that are objective in character, even though we do not always do so. Or at least I think it good protective policy to assume this.

Behind and beneath our disagreement here is Freedman's total separation of human freedom from the object of its exercise. For Freedman, freedom as a pure and arbitrary power is a value in itself, an end value, a value independent of the task to which it turns or of the rightness or wrongness of its exercise. I cannot accept that (and that is why he is at best a reluctantly normative thinker). It unduly exalts mere nondetermination (freedom *from*). There is a long and honored philosophical and theological tradition which values self-determination above all in terms of the goods or values encompassable by free choice (freedom *to*). Misuse of that freedom is no value in itself, as Freedman's perspective implies; indeed, it is a disvalue. Whenever human beings misuse their freedom, they suffer and visit suffering. The capacity to misuse freedom is but the unavoidable condition of its proper use. In this perspective, the right is to be free in order to do something. In doing that something for someone and letting him know in advance of his death or incompetence that I will, I am expanding his freedom by rendering more secure the good for which his freedom exists. But an exchange longer than possible here would be required to expose Freedman's philosophical assumptions about freedom, assumptions with which I almost certainly would disagree.

Freedman's second theoretical problem with the hypothetical test is the ultimate unpersuasiveness of the "whole-life view" of rights—the notion that respect for persons demands of us that once they become incompetent, we carry forth their projects. He rejects this on the grounds that "it is engaging in the project, and not the project itself, which respect for persons enjoins us to support" (pp. 209–10).

Once again we have projects unduly separated from engaging in them—a kind of canonization of mere engagement, just as we saw a purely formal notion of freedom canonized. Actually, respect for persons must encompass both the person's engagement and the project itself. That is why, I submit, it makes sense for families to specify the charity favored by the deceased as an appropriate manifestation of solidarity. That is why caring for the children of the deceased is not simply an act of beneficence to the children, but an act of respect for the deceased.

Furthermore, and practically, if one knew that others need not further

one's projects after one's death (on the grounds that only his personal engagement, not his project is of value), one would resent this as denigrating him by denigrating one's projects after death. It would equivalently say that one's projects—the objects of one's care and love—did not matter. There is a radical individualism at work in Freedman's analysis, namely, the idea that what concerns me, interests me, is my doing of the charitable work, not the fact that others whom I love are bettered as a result. For instance, if I am devoted to my mother, I certainly wish (now) that after my death others continue to benefit her. If I do not so wish now, then I am interested only in myself. And if others tell me that respect for my person involves their support only of my engagement in my care and love for my mother, not her care after my incompetence, then I now experience their lack of respect for me. Freedman's undue separation of project from personal engagement leads to this kind of individualism. Contrarily, I want to know now that others will care for the persons I love, and the assurance that gives me this knowledge is an act of respect for me. Its fulfillment, as completion of a consoling promise, is no less.

2. The reasons for Freedman's undue separation of the two tests: We turn now to the second point. Why does Freedman unduly separate the two test schemata ("entirely distinct")? I have already suggested above why this is the case—for example, his individualistic notion of best interests, of freedom, etc. Here I should like to concentrate more specifically on these reasons, especially his notion of best interests. "How are we to determine," he asks, "what is in his best interest? Through determining his idiosyncratic notion of what is in his best interest, or through some community standard of what is good for a person—and if the latter, which of the communities in which he partakes is relevant?" (p. 203). Here we see Freedman having difficulty in determining what is in a person's best interest by giving equal valence to two criteria: (1) one's own idiosyncratic notion of best interest; (2) some community standard. Most people, I believe, would have no such difficulty. They would think that what is actually in a person's best interest ought to prevail over what the deluded or misguided person thinks is in his best interest. In this sense, again, most people would be objective or normative in determining best interests, for best interests are best interests, not putative best interests. Furthermore, most people would accept "some community standard of what is good for a person." Freedman's reluctance to do this underlines either of two facets of his thought: (1) his skepticism about our ability to determine what is truly for the good of persons, (2) or his reluctance to use such standards in cases of incompetence once we have discovered them.

In contrast to this, I believe the broad lines of what is in our interest as persons is available to human insight and reasoning. That is, there are certain actions objectively destructive or promotive of us as persons. Furthermore, I believe that such perceptions should form the basis on which we

build our judgments about what is in the best interests of incompetent persons. It is possible that behind Freedman's skepticism is the lack of a normative theory of man, of those goods which define our flourishing as persons. It is also possible that he has such a theory but is reluctant to use it in this context. I just do not know. At any rate, best interests seem to be in his thought what any individual judges it to be, however idiosyncratically.

Let me detail this in another way. I find five factors converging in Freedman's presentation—five factors that are responsible for his total separation of the two test schemata. (1) There is a lack of any normative anthropology whereby we know what goods are the source of our well-being (best interests). (2) Desires and wants are purely arbitrary (and they are the foundation of rights, and therefore of duties with regard to rights). There is no way of adjudicating between reasonable and unreasonable, and even if there were, it is not clear how these notions are relevant to decisions for the incompetent. (3) He is unduly skeptical about our ability to know what a person would want. (4) Best interests are narrowly identified with getting or keeping something for myself (an insensitivity to our social nature and the conclusions we might draw from this). (5) There is a failure to distinguish the occasional difficulty we experience in applying a test with its general validity.

For these reasons, what a person would want, as we construe it, can be entirely different from what is in his best interests. Therefore, the tests are "entirely distinct." Or, as Freedman words it, "there is not much conceptually in common between what someone wants with what is best for him." Of course, that is true. We are all inconsistent; we are even sinners. But here we are trying to construct what is in the best interests of an individual, what the reasonable person would desire or want. Therefore, we do not and need not take as our guide in some area what some eccentric desires, or what we desire when we commit sin (i.e., act against our best interests and those of our neighbor). There is at least an area of the objectively reasonable; otherwise there would be no standard against which we could identify the eccentric, the idiosyncratic, the wrongful. Or again, without an area of the reasonable, judicial reversal of parental refusal of treatment for a child would be utterly arbitrary. Relating desires to reasonable desires is not "confusing" the two. It is rather insisting that the normative in our conduct is related to available insights about what is good and bad for us as persons and is the basis for safe and respectful (of persons) judgments.

On summary, then, I cannot agree with Freedman that the hypothetical test and the best-interests test are "entirely distinct." Rather, the hypothetical test is a way of formulating, of getting at the best-interests test, this latter being the basic test. That is why it is legitimate and meaningful to say that "he would want it that way were he competent because it is in his best interests." The vehicle that helps to keep these tests closely related is the reasonable-person test. That is, the reasonable-person test is a way of

saying that best interests ought to be interpreted normatively, not just according to arbitrary wishes, if we are truly seeking best interests.

In the light of this, let us return to the Swiss Academy. Freedman sees their approach as problematic because it creates the possibility of disregarding the living will when the physician feels this is not in the best interests of the person. The academy, he argues, has made the mistake of thinking the living will is a "means to determining what a person would have wanted." Actually, I do not believe this is a mistake. If the best interests are truly determinative, and the circumstances determining this have substantially changed, then what the person would want now is clearly a useful way of getting his best interests cared for.

In other words, what the person would want can at times better protect his interests than a living will. If so, it is reasonable to think a living will can above all serve the purpose of a general pointer toward best interests. It is not, therefore, the academy's position that is problematic. It is first written living wills that are problematic. They cannot foresee all circumstances and hence cannot be written in such a way as to guarantee the best interests of the patient. The academy is right, I think, to believe that these interests ought ultimately to be controlling, and that therefore wills are not always binding. This is admittedly a sensitive and difficult area, but where incompetents are concerned (with competents the physician can always withdraw from the case where he feels the patient is frivolously endangering his best interests), the problems and dangers of overriding a will in certain cases are less than those associated with unquestioning adherence to it. For this latter policy could involve us (and the medical profession) in responding to a person's incompetence in ways we all admit are genuinely opposed to his best interests. I see that as an assault on our integrity and that of the medical profession.

3. Freedman's treatment of my use of the reasonable-man standard: I turn now to my third point, Freedman's treatment of my use of the reasonable-man (I prefer "person") standard. He sees this use as a normatively based test "rather than" an empirically grounded one. The emphasis is correct, but the contrast ("rather than") is too sharp, as are most of Freedman's distinctions and separations. I simply have more confidence than Freedman in the fact that most people would choose (empirical) in the direction of their objective best interests (normative).

Be that as it may, Freedman has difficulties with the normative sense of the hypothetical test. He believes it abounds in confusions ("blatant" is his rendering). He cites two: (1) material goods for the child with moral goods, and (2) "what the child would choose with what the child would reasonably choose with what the child, if moral, would choose" (p. 202). A word about each.

First, it is not clear to me what Freedman means by attributing to me a confusion of material and moral goods. The argument I had made in attempt-

ing to justify minimal risk nontherapeutic experimentation on incompetents (children) is that a good (material) is procured for others at no cost to the child (*parum pro nihilo reputatur*, "very little counts for nothing" in moral estimates). If I had argued that the child benefits by practicing virtue, I would indeed be commensurating material and moral goods. But that is not the heart of the argument. However, I will concede that my wording could have misled Freedman. For, in analogy with the therapeutic situation, where the fetus or child could be construed (substituted judgment) as choosing for his own best interests, I stated: "Are there other things that the child *ought*, as a human being, to choose precisely because and insofar as they are goods definitive of his growth and flourishing? . . . If we can argue that a certain level of involvement in nontherapeutic experimentation is good for the child and therefore that he *ought* to choose it, then there are grounds for saying that parental consent for this is morally legitimate . . ." (McCormick, 1974, p. 12).

That phraseology ("good for the child") is misleading because it leads too many to interpret it as a moral good. The phrase was actually meant to convey the idea of "not opposed to the child's best interests." I used the wording "good for the child" to keep the thought continuous with the general theory I was proposing.

If something is not opposed to a child's best interests and simultaneously offers great hope of benefit to others, then there is legitimacy in saying (by obvious construction) that the child "ought" to do it. This by no means implies that the child is a moral agent. It is simply a way of formulating what we may do with a child short of violating his/her integrity. However, if too many readers are perplexed by the strong formulation "the fetus/child *ought* reasonably to consent to," I am perfectly willing to accept Stephen Toulmin's emendation, what he calls "one small modification." It reads as follows: "What may it be presumed that the fetus *could not reasonably object to*, if it were capable . . . ?" (Toulmin 1975, p. 34).

I accept that emendation, but would note several things. (1) It does not alter the substance of my position, as Toulmin notes. (2) It is a clear instance of substituted consent (hypothetical test). (3) It has normative roots. That is, the fetus could not reasonably object because a potentially great good is supplied to others at no cost to the fetus/child—hence, by construction, the fetus "ought" to choose it. (4) What one "ought" to do (i.e., cannot reasonably be opposed to) is at least not opposed to his best interests; or, more positively, is compatible with his best interests. This reveals the complementarity of the hypothetical and best-interests test.

I would conclude, therefore, that the position I attempted to propose supports, as I think it should, the close relationship between the hypothetical test and the best-interests test. Concretely, the fetus/child would choose his share in nontherapeutic experimentation because—to adapt from Toulmin—it is compatible with and not opposed to his best interests.

The second "confusion" Freedman believes he finds (between what the child would choose, would reasonably choose, would choose if moral) is not a confusion at all. It is simply an attempt to interrelate the hypothetical and best-interests tests. It is a "confusion" only if these tests are "entirely distinct," as Freedman claims. They are not.

In summary, then, I agree with Freedman that there are only two test formulations for determining the content of the rights of the incompetent: the hypothetical test, the best-interests test. The reasonable-person test is a vehicle for the interpretation of either of them.

I disagree with him on three major points. First, he conceives these tests as "entirely distinct," as two different ways of concretizing the right of the incompetent. I do not. They are interrelated. Indeed, in a sense, there is only one basic test—the best-interests test. The hypothetical test is subordinated to, is a proximate formulation of, the best-interests test: he would choose because it is in his best interests.

Second, I believe my own analysis is precisely at root and in substance a best-interests test: the fetus/child would choose nontherapeutic experimentation of minimal risk because it is compatible with and not opposed to his best interests.

Third, I suspect (but only that) that we have substantial disagreements about how normative the determination of the rights of the incompetent should be. Of the three assertions (what the child would choose, would reasonably choose, would choose if moral), Freedman says: "Each of these steps is logically illegitimate." He will have to explain this more than he has. If he means that we cannot deduce one step from the other without some normative anthropology, he is certainly correct. If he means, however, that such an anthropology has no place in determining the best interests and rights of the incompetent, then our disagreement is profound indeed. For in my judgment the best interests of a person, if they are truly to remain *best* interests, must root in the very notion of who the person is.

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Five Red Herrings and an Issue: Response to McCormick

BENJAMIN FREEDMAN

In this brief rejoinder, I want to eliminate the red herrings that stand in the way of recognizing what really stands between my position and that of McCormick. I term "red herrings" those points which rest upon faulty reading of my position or McCormick's own position, or upon the raising of nonissues.

1. McCormick indicates that my efforts to prove the distinctness of the hypothetical test and the best-interests test fail. In truth, though, I made no such efforts. It seemed and seems to me that the tests are so obviously distinct as to need no proof; all that is required is to state them clearly, and, once this is done, I fail to see how anyone could assert an identity between a rule which requires of us that we treat a person as he would have wished to be treated, and one which has us treat someone in accordance with his best interests. The distinctness remains when treating of McCormick's variant of the hypothetical test, which refers to what a reasonable person would have wanted, if the identification of the reasonable person is done, at least in part, by empirical rather than normative means.

McCormick recognized that, "factually and *per accidens*," these tests may differ. But logic suggests that if two tests may yield different results, they are separate; and so, if they yield the same result, that too is only "factually and *per accidens*" the case. Morality and prudence suggest that if two tests yield different results, we must inquire which is to prevail in cases of conflict. My answer, one which I believe to be consistent with McCormick's views, is that the best-interests test should prevail.

2. McCormick suspects that my theory of how we determine what is in X's best interests is faulty in various ways. However, I state no theory regarding this in my paper, as McCormick recognizes. For reasons of space, I excised a portion of my original paper, in which I argued that an objective notion of what is in X's best interests qua human being ought to be adopted. Implicit in this, McCormick correctly points out, is a normative anthropology, a subject which I could not pursue in the space available. When I raised

the question of how to determine what is in X's best interest, I did just that: I raised a question and did not suggest giving "equal valence" to the various (not two) ways of determining one's best interest.

3. I regret that McCormick sees my practical reasons for preferring the best-interests tests to the hypothetical test as being "mysterious." As stated in the paper, they were based upon the idea—one which I believe McCormick shares—that ultimate analysis would reveal that, in my words, "well-intentioned judges" would find the best-interest test "more easily determinable and hence less given to abuse" than its alternative. I think McCormick shares that idea regarding the view of the best-interests test, which we share, as one based objectively upon the nature and welfare of man qua man.

4. I welcome McCormick's clarification of his position regarding minimal risk nontherapeutic experimentation upon children. I understand him to be saying that such experimentation ought to be allowed, not because it is in the child's interest, but because it is, in his words, "not opposed to the child's interest." I entirely agree with such a formulation and consequent position. Indeed, in an earlier paper (Freedman 1975, p. 38) I argued that the fundamental right of children is to be protected and aided in development; that, in consequence, "we are at liberty to deal with the child in ways which neither help nor hurt"; and, therefore, nonrisk experimentation upon children is licit.

Though I think our positions are the same, I cannot be certain of this. Following McCormick's explanation of his position—that what he meant is that such experimentation is, rather than good for the child, not opposed to his welfare—he proceeds to claim legitimacy for saying that the child "ought" to participate. "This," he says, "by no means implies that the child is a moral agent." And then he says, "This is simply a way of formulating what we may do with a child. . . ."

One reading of this has McCormick saying that although the child is not a moral agent, he ought to do something; and this, it seems to me, is a contradiction. It is necessary that if the child is not a moral agent, he not be morally obligated to do anything. Further, if he *is* a moral agent, his participation in an experiment is not merely "what we may do" but rather "what we *must* do." This interpretation must therefore be ruled out as contradictory, but I cannot suggest any alternative explanation.

5. I rejected the hypothetical test on the grounds that it does not, as appearances would suggest, preserve freedom, for the value of freedom lies not in the content given it but in its exercise. McCormick's counterargument is that "misuse of that freedom is no value in itself, as Freedman's perspective implies; indeed, it is a disvalue." This is not to the point.

A human action, viewed from the perspective of ethics, is a complicated thing, with many "right-making" and "wrong-making" characteristics entering into it. Thus, an action stemming from human freedom may

have a net disvalue, if its "wrong-making characteristics" are bad enough; hence, we do not allow people to murder freely. The fact that an act which stems from a free choice has in consequence a "right-making characteristic" must be shown with reference to cases where the content of the act is morally neutral, so that the value or disvalue would clearly be owing to the fact that the act represents free choice. One such morally neutral content would be stamp collecting. I feel that these actions with morally neutral content have a net positive value because they are expressions of human freedom and projects, and hence protective of human dignity.

So misuse of freedom is a nonissue; the proper test is actions whose content is morally neutral, rather than bad. Similar remarks apply to McCormick's counter to my point about the worth of human projects lying in the engagement in them, rather than in what they are; only there the nonissue raised is morally praiseworthy projects, rather than morally neutral ones.

The real issue between us is not which test ought to be used. I hold that the best-interest test ought to be followed and never deviated from in favor of the hypothetical test, and McCormick agrees: "The hypothetical test is subordinated to, is a proximate formulation of, the best-interests test. . . . I believe my own analysis is precisely at root and in substance a best-interests test."

Rather, the issue is this: McCormick would retain the hypothetical test in one form ("what a reasonable man would have wanted") as a fallible but generally useful rule of thumb to deciding what is in the best interests of the voiceless. To this I am opposed. If McCormick's formulation should yield the same result as the best-interests test, why follow that formulation rather than its touchstone, the best-interests test itself? And should it yield guidance opposed to the best-interests test ("factually and *per accidens*"), it would not merely be useless but positively harmful.

We appear to differ as well on the value of clarity in ethical discourse. McCormick holds that his formulation—"he would assent because it is in his best interests"—is not a confusion of two different tests, but rather an "interrelated formulation." "Let it be said that a close relationship within a distinction is not necessarily a confusion," he argues. *Per contra*, I would say that identifying two empirically similar (not identical) but conceptually distinct rules is a confusion.

When philosophers run them together, it is regrettable; when courts do, it is pernicious. The majority in *Strunk* ran them together, not by employing both rules (as McCormick seems to believe I hold), but by citing precedent for one as though it were precedent for another. It appears that this confusion persists in *Saikewicz*, either in the court or in the minds of legal commentators (or both). *Saikewicz* does not, by the way, accept the "reasonable man" formulation of the hypothetical test when given an empirical understanding of the reasonable man: "statistical factors indicating that a

majority of competent persons similarly situated choose treatment (as all agree was the case here) [does not] resolve the issue" (Quoted in Annas [1978 p. 22]). But it does confuse the hypothetical and best-interest tests utterly, at least in the understanding of one expert in the law of medicine, George Annas: "The court . . . opts . . . for a subjective test, the goal being to 'determine with as much accuracy as possible the wants and needs of the individual involved.' This is the doctrine of substituted judgment—trying to determine what the incompetent would do if he or she could make the choice. . . . The task of the probate judge is, therefore, to ascertain the incompetent person's *actual interests and preferences*" (p. 22, emphasis added). How they could be his actual interests if the judgment employed is "substituted" (i.e., substituting ours for his incompetent judgment) is beyond me; this is reification with a vengeance. And how we should determine the interests and preferences of an inmate with an IQ of 10 who is nonverbal to boot is also beyond me, as it is beyond me why we should care what his actual preferences are, rather than what his best interests require. Immediately upon completion of my first reading of McCormick's response, I turned on the television to catch Vladimir Horowitz's performance at the White House. My disturbance at the performance may have been residual. It seemed to me that the notes were lovely, but Horowitz kept slurring them together.

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Book Review

TERRY PINKARD*

Truthfulness and Tragedy: Further Investigations into Christian Ethics.

By Stanley Hauerwas (with Richard Bondi and David B. Burrell).
South Bend, Ind.: Notre Dame Press, 1977. Pp. 251. \$12.95 (cloth);
\$4.95 (paper).

Hauerwas attempts three major things in his new book of essays on ethics and bioethics: (1) to present a general theory of ethics and a foundation for bioethics which departs from the way in which the subject is treated by most contemporary ethical or bioethical theorists; (2) to show how Christian ethics is best understood by seeing it as an embodiment of Hauerwas's ethical theory; (3) to show how his understanding of ethics facilitates a better comprehension of many contemporary bioethical dilemmas, such as euthanasia, care for the mentally retarded, and problems in neonatal extensive care of defective infants.

His general theory of ethics is perhaps best understood by outlining what he thinks to be the largely false modern misunderstanding of ethical theory. Contemporary ethicists, whether they be utilitarians or Kantians, see the purpose of ethical theory to be in some sense an analysis of moral rules. (Hauerwas calls this the "standard account.") This insistence on the careful analysis of moral rules derives from the modern demand for, and interpretation of, objectivity, where objectivity is identified with scientific objectivity, that is, with standards that are atemporal, acultural, impersonal, and universal. Because of this "scientific" paradigm, contemporary ethical theory tends to be a rather formalistic enterprise, concentrating mostly on technical niceties and reformulations of standard ethical "positions," such as deontology and utilitarianism. All reference to the agent except as a rational rule follower must be eliminated; any other aspects of the agent must instead be regarded as idiosyncrasies and therefore irrelevant for ethical theory. "What I am morally obligated to do is not what derives from being a father, or a son, or an American, or a teacher or a doctor, or a Christian, but what follows from my being a

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person constituted by reason" (p. 17). Ethics, therefore, naturally becomes a study of decisions-procedures for resolving questions where the rule on the application of the rule is in doubt—hence, the formalistic emphasis of contemporary ethical theory.

Against this view, Hauerwas objects that such a paradigm cannot have a place for considerations of what kind of character we should have, for character is something merely idiosyncratic to the agent. But this fails to do justice to a central part of ethical life, namely, that the kind of ethical decisions which we confront are a function of the situations in which we find ourselves and how we describe such situations is a function of our character. If this fact is accepted, so Hauerwas claims, a different view of ethics arises. A situation is in part constituted by the way in which the agents describe it and thus by their characters; their characters, however, are not wholly chosen by them but are in part constituted by the community to which they belong (if nothing else, by the language used to describe the situation). Thus, an understanding of the community is necessary, and this understanding (this is Hauerwas's central claim) must be historical, that is, be narrative in form. In fact, Hauerwas claims that "all our notions are narrative-dependent, including the notion of rationality" (p. 21). Ethics, then, is historical in nature and cannot be a science, as the standard account would have it.

A narrative is a connected description of action and suffering that has a plot and moves to a point which is a development of the earlier events. Hauerwas does not specify what the nature of the connection between events in a narrative is, except to say that it is neither logical implication nor a mere sequence; he does not consider, for example, that it might be causal. The test of the goodness of a narrative is its effect on us, how it leads us to become different persons (Augustine's confessions are a case in point for Hauerwas). Since character is something developmental in nature, it too is best comprehended and criticized from the narrative viewpoint. Truthfulness can only be gained by telling a story, by displaying, so to speak, the development of the characters which put us in the moral situations in which we find ourselves.

Narratives also allow us to see the developments of the roles we play and, hence, of the nature of the obligations which we have. Moreover, it allows us to see how there is no answer—especially no decision-theoretical answer—to certain moral dilemmas we face. A moral dilemma is one of conflicting obligations, and, if Hauerwas is correct, this is because of conflicting roles we play vis à vis one another. In this regard, Hauerwas speaks of medicine as a tragic profession. Because of the historical development of the institution of medicine, doctors are often put in inescapable dilemmas: on the one hand, they are to prevent suffering; on the other hand, they are to prolong life. Yet often prolonging life means prolonging suffering and ending suffering means shortening

life. This is tragic because there is no clearly right or wrong thing to do; tragedy occurs when, with the best of intentions, people find themselves in situations in which they must choose and all choices are equally bad and equally good.

In all the essays, Hauerwas stresses that the Christian narrative offers an optimal setting for truthfulness in the moral life, even if it is not the only story which does. But this claim is defensible only if Hauerwas's more general scheme is also defensible, and there remain difficulties with the latter. First, Hauerwas might be accused of (unwittingly, of course) making the same error of which emotivists have been accused, namely, of confusing the effect of an argument with its validity. If the test of a narrative is its effect on the person's shaping of his or her character, then narrative becomes a part of rhetoric. It is like the emotivist saying that the goodness of a moral argument is its effect on the speaker—but that confuses, say, propaganda with rational argument. Hauerwas might counter and say that a narrative, to be good, must produce truthful character, but that is equivalent to saying that it must produce good, which makes good an independent, nonnarrative notion and contradicts Hauerwas's earlier claims. Nor is his claim a clear one that contemporary ethical theory cannot (not merely does not) recognize tragedy; there is nothing logically wrong with saying that two ethical principles which are exclusive of one another both apply to the same situation. In fact, the case of medicine as a tragic profession would be an illustration of this. Thus, even though some of his criticisms of contemporary ethics may be to the point, his version of a historical "virtue ethic" may not be the only alternative.

The book is, however, incomparably richer than this review can intimate. A merely cursory glance at the table of contents would show that to be the case. Hauerwas treats natural law, population control, child rearing, the definition of being a person or a human, suicide, and a host of other topics. On each, he has something provocative to say. He has provided a heuristic view of many bioethical issues.

A NOTE TO PROSPECTIVE AUTHORS

While the *Journal's* editors will invite articles for all issues, they will also consider for publication unsolicited papers provided these are directed to the announced issue themes. Instructions to authors concerning the preparation of papers may be obtained from Dr. Ronald McNeur, Society for Health and Human Values, 1100 Witherspoon Building, Philadelphia, Pennsylvania 19107.

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The Problem of Abortion and Negative and Positive Duty

JAMES LEROY SMITH*

Philippa Foot has argued that we need not defend the Doctrine of Double Effect (DDE) because a distinction between negative and positive duties serves just as well in typical cases and serves better in at least one case (1967).

Without defending DDE, I wish to show that at least her application of the negative/positive-duty distinction is less than convincing, it not in fact inconsistent. I do not argue that the distinction itself has no use in moral judgment.

My general commitment is the common one: moral problems in medicine involve judgments and not just feelings; sound judgments are made only by way of applicable, adequate, coherent, and consistent criteria; and criteria can be established by the drawing of distinctions and refined by example and counterexample.

I begin with her review of DDE and two of the cases she presents on behalf of DDE supporters,¹ such cases having been thought to establish the soundness of DDE. I then review her drawing of the distinction between negative and positive duties and her application of that distinction to those same two cases, an application which, she believes, absolves us of the duty to defend DDE, since her distinction is offered as working as well as (and in at least one case even better than) DDE. Thereafter, I examine her application of the negative/positive duty distinction and point out a serious problem with that application. Finally, I examine three potential abortion cases in which there are some situational differences and consider whether or not such differences have moral relevance from the points of view of, respectively, DDE, Foot's application of the negative/positive-duty distinction, and my examination of her application of that distinction.

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¹ Foot presents three cases in her essay, but a review of only two suffices here.

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The Problem of Abortion and Negative and Positive Law

James L. Garfield

There is a great deal of talk about the problem of abortion, but very little about the problem of the law. The law is the only thing that can be sure to be followed, and it is the only thing that can be sure to be followed.

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I

The Doctrine of Double Effect is based on the distinction between what we strictly intend as a consequence of an act and what is a foreseeable but not strictly intended consequence of that act. Support for this doctrine can be adduced through the following examples:

EXAMPLE 1.—A judge is faced with rioters that demand that a culprit be found for a certain crime and threaten to otherwise take their own bloody revenge on a particular part of the community. The judge can either prevent a massacre by executing an innocent person or he can stand by in the face of an imminent slaughter. Supporters of DDE claim the necessity of their doctrine in order to account for our deeply felt reticence to execute the innocent person: the death of such a person could only be strictly intended by our action, whereas to stand by would not be to strictly intend the death of others in the community, even if such death is a foreseeable consequence of standing by.

Alternatively, consider that a train engineer is forced to steer his runaway train up either one or the other of the only two tracks available to him, and he must act to determine which track he will take. On one track there are five workers and on the other only one. Here it is reasonable to steer up the track with only one worker on it, and DDE accounts for such intuitive reasonableness. Death is a foreseeable consequence of either choice but is strictly intended in neither, and we can act on the basis of numbers alone.

Thus, although we decline to kill one to save many (say five) in the judge example, we agree to cause the death (foreseeable, but *not* strictly intended) of one as opposed to five in the train example. Our intuitions are, then, accounted for by the strictly intended versus foreseeable consequence distinction and not by mere numerical tabulation. Thus, DDE receives support.

EXAMPLE 2.—We are about to give a certain drug which is in critically short supply to a patient who needs the whole supply in order to survive. Five other patients arrive all of whom can be saved by the administering of one-fifth of the supply to each. With regret but also approbation we administer the drug to the five new arrivals. We do not strictly intend the death of the patient who needs the whole supply, even though a foreseeable consequence of administering the supply to the other five is the death of the one patient needing it all. Notice that our purposes are served nonetheless should that patient recover through some miracle or other. Thus, we could hardly be said to be strictly intending that patient's death.

Alternatively, consider that a single patient is terminally ill and that by killing this patient we can obtain sufficient organs to save five other patients whose deaths are otherwise imminent. Would we kill the terminally ill patient? Our intuitions tell us no and DDE accounts for our intuitions: if the five die without the transplants, we

could not be said to be strictly intending their deaths, while we could be said to be strictly intending the death of the terminally ill patient if we killed him. Our purposes could not be served without his death occurring.

Thus, once again, the nature of our intentions and not mere numerical tabulation accounts for our institutions and DDE receives more support.

II

In the face of these justifications of DDE, Foot asserts convincingly that it is not obvious that all instances of strictly intending involve doing or that all instances of consequences foreseeable but not strictly intended are merely allowed. One can strictly intend the death of a companion in war by not warning him and one can foresee but not strictly intend death (as with the train driver) even while doing the act which causes it. These results somehow lead Foot to an analysis of "allowing," which analysis produces a sense of allowing considered relevant, namely, the sense of allowing as "forebearing to prevent." I shall refer to this sense of allowing as "declining to prevent." The question now is this: is there a morally relevant difference between what we do or cause and what, on the other hand, we merely allow in the sense of declining to prevent? Surely one is as bad as the other in some cases; for instance, we may murder our children as well by starving them as by giving them poison. Declining to prevent their starvation is clearly as morally blameworthy as giving them poison. On the other hand, declining to prevent the death by starvation of some persons in a far-off land by sending them our food is not as blameworthy as sending them poisoned food. Thus, in some cases, there is a morally relevant difference between what we owe others in the form of aid and what we owe them in the way of at least some kinds of noninterference. Thus, Foot argues, there are some cases when our duty to bring aid is not as strict as our duty not to cause injury. Indeed, she asserts that "... one does not *in general* have the same duty to help people as to refrain from injuring them" (p. 12). The duty to refrain from injuring people she calls a *negative* duty and the duty to help people she calls a *positive* duty. Thus, *in general*, our negative duty takes precedence over our positive duty whenever the two conflict.

With this distinction now drawn, Foot maintains that we can return to the examples above and be as well served as we were by DDE.

EXAMPLE 1, AGAIN.—Considering the train engineer first, we see that his was a conflict of negative duties; that is, his duty not to bring injury to five conflicted with his duty not to bring injury to one, and in such cases it is reasonable to act on the principle of least harm caused. The judge, on the other hand, has a conflict between the negative duty not to harm an innocent "culprit" and the positive duty

to bring aid to the threatened portion of the community. It does not follow from the reasonableness of the train engineer's action in saving five over one that the judge should kill one to save (we can say) five, because the same kind of conflict is not present in each case. Thus, the negative/positive duty distinction accounts for our intuitions as well as does DDE.

EXAMPLE 2, AGAIN.—Here the hospital staff members faced with the scarce-drug conflict have in fact a conflict of positive duties. They have a duty to bring aid on the one hand to one person and on the other hand to five persons, and it is reasonable to act on the principle of most aid brought. In the case of having a terminally ill potential donor and five other patients who need organs thereby made available, the conflict of duty is between the negative duty not to bring injury to the terminal patient and the positive duty to bring aid to the other five. As before, so also here, it does not follow from the fact that it is reasonable to save five in the scarce-drug circumstance that it is equally reasonable to save five here: the duty conflicts are different in each case. Again, the new distinction between negative and positive duty serves as well as DDE to account for our intuitions.

Moreover, there is this example, which shows the superiority of the negative/positive-duty distinction to DDE:

There are five patients whose lives can be saved by the production of a certain gas, the manufacture of which would cause the death (by lethal fumes) of another who cannot be moved. The DDE would indicate, contrary to our intuition, that we would be justified in proceeding: if the unmovable patient dies we could not be said to have strictly intended it since the death is not a necessary means or object of our action. We strictly intend only the production of the gas in order to save the five patients who need it. Clearly, though, we would be reticent to proceed. The general priority of negative duty explains this reticence, while DDE does not.

III

I wish now to examine Foot's distinction by considering an example which she introduces to point to a problem that supporters of DDE would have. I want to isolate that problem and argue that her own distinction, at least as she applies it, has the same or a very similar problem.

Consider that five thin spelunkers and one fat one are descending into a narrow cavern in the attempt to find its bottom. Suddenly, they discover rapidly rising flood waters and hastily begin the climb back out to avoid being drowned. The fat one, originally in the rear, now finds himself leading the scramble and, through haste and improper procedure, wedges himself inextricably in the mouth of the cavern,

feet out and head down in the cavern with his extremely desperate companions. To remove the possibility of vested interests, presume it is a party of complete strangers who happen by outside, size up the situation for what it is, and discuss their options. Either they can do nothing, which shall result in the imminent and foreseeable death of all six explorers, or they can kill the fat one and remove him from the aperture by dismemberment, thus saving the other five.

Foot points to a problem which DDE does not adequately solve: suppose we tried to argue that DDE allowed us to proceed with the killing and dismembering of the fat spelunker on the grounds that what we strictly intend is the opening of the aperture and the means to that end, namely, the dismemberment of the wedged spelunker, but not his death. Although she supposes that no DDE supporter would so argue, the supposition does raise the question as to what counts as "close" enough to our strict intention to be considered as part of that intention. If we say that anything close to what we are literally aiming at counts as part of our aim, then where do we draw the line? What is our "criterion of closeness?" This she apparently sets forth as one means to a beachhead against DDE, and she then sets about examining the ways in which DDE has been supported and the manner in which her negative/positive duty distinction serves in comparison, all of which we have already reviewed.

But let us not dismiss the spelunkers so quickly. Later in her essay she asserts that her distinction would apply to the spelunker example as follows. The strangers have at best only a conflict of positive duty, given that all six face imminent death if nothing is done. But even this conflict—that of aiding the fat one versus aiding the other five—quickly dissolves as the strangers observe that there is absolutely no way to bring aid to the fat one in question. Thus, there is no conflict at all, and she finds it reasonable that the strangers aid the five below by killing and dismembering the unfortunate one blocking the aperture.

But notice what has happened in her application of the negative/positive-duty distinction. The reticence that was so deeply felt in the case of the judge contemplating killing the innocent "culprit" and in the case of the hospital staff contemplating killing the terminally ill patient has not emerged in the case of the fat spelunker—and why not? The only relevant difference in the cases seems to be that with the spelunker his death is imminent. But the imminence of death is an uneasy criterion.

Suppose the judge decides to select his innocent culprit from that part of town toward which the unruly mob is already beginning to sway, let us say even some innocent person that the crowd has already begun to bludgeon. Would we feel any less likely to argue that the judge has a negative duty toward that innocent person? No. And yet, clearly, that person's death could be said to be imminent, at least just as imminent as that of the fat spelunker.

Moreover, suppose that the hospital staff, still searching for organ donors in order to save the five who need transplants, decides to kill a terminally ill patient who has already shown signs of dying, perhaps even of the cessation of the most vital of signs. Would we feel any less likely to argue that the staff has a negative duty toward that terminally ill patient? No. And yet, clearly, that person's death could also be said to be just as imminent as the fat spelunker's.

If we would not be swayed to kill the innocent "culprit" already in the hands of the avenging mob or the terminally ill patient already showing the loss of vital functions, then we cannot be consistently swayed to kill and dissect the fat spelunker. If we have a negative duty toward the former two, then we have a negative duty toward the latter as well. That is, if "closeness of death" can in any case absolve us of our negative duty toward those so threatened, how close must death be? So close, so to say, as to disarm us completely. Thus, if the negative/positive-duty distinction is to be of aid to us, it must be applied more convincingly than Foot applies it.

IV

I shall now test the results of this cooperative analysis by considering three potential abortion cases,² each of which is situationally different from the other two. The question is, from the points of view of, respectively, DDE, Foot's use of the negative/positive-duty distinction, and Section III above—what are the relevant moral differences?

CASE I.—*Nothing can be done which will save the lives of both mother and fetus, the life of the mother can be saved by operating such as to kill the fetus, and the fetus cannot be saved in any case. The fetus is full-term.*

DDE: Since the only action which could have a relevant effect is an action which must strictly intend the death of the fetus, DDE dictates that we should not intervene.

FOOT: She likens this situation to the fat spelunker case. Since death is imminent for both mother and fetus, it is reasonable to say that our negative duty toward the fetus has been absolved and we may without blame kill it for the sake of the mother. Since we can in no case bring aid to the fetus, we have no positive-duty conflict.

SECTION III: If we would feel horrified by the judge who would kill the innocent culprit even as the latter is being bludgeoned by the mob or equally horrified by the hospital staff acting to kill even the presently

² These three cases are based on cases with Foot reviews, but I have refined the situations to prevent possible confusion. Her examples allow too many unknowns in the situations.

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of the growth of a nation from a collection of small, separate colonies to a united people. The first step was the signing of the Declaration of Independence in 1776, which declared the colonies free from British rule. This was followed by the signing of the Constitution in 1787, which established the framework for the new government. The early years of the nation were marked by challenges, including the War of 1812 and the struggle for slavery. However, the United States emerged as a powerful and independent nation, and its influence grew over time.

The United States has a long and rich history, and its people have made many contributions to the world. The country has been a leader in the fields of science, technology, and culture. It has also been a champion of democracy and human rights. The United States has a strong tradition of freedom, and this has been a key factor in its success. The country has a diverse population, and this has helped to make it a more包容 and understanding nation. The United States is a country of many opportunities, and it is a place where people can live and thrive.

The United States is a country of many achievements, and it is a place where people can make a difference. The country has a strong tradition of innovation, and this has helped to make it a leader in many fields. The United States has a strong tradition of service, and this has helped to make it a more caring and compassionate nation. The United States is a country of many dreams, and it is a place where people can achieve their goals. The United States is a country of many possibilities, and it is a place where people can make a better world.

dying terminal patient in order to use that patient's organs to save others, it would then be apparent that "imminent death" is no acceptable criterion whereby to disengage our negative duty not to bring harm. On the grounds of the negative-duty criterion, it seems reasonable not to intervene. (Obviously, if we rejected the suppressed premise that the fetus was a person, or if we felt some other moral principle than that of our negative duty could be shown to take precedence in this case, we might then consistently intervene.)

CASE II.—*It is possible to operate such as to save the mother by killing the fetus or to operate such as to save the fetus by killing the mother, no possible action will save both, and standing by insures that both will die. The fetus is full-term.*

DDE: Clearly, we must stand by. Operating to save one must in either case involve the strict intention to kill the other. To have the strict intention of saving one is to strictly intend the means to save that one; those means are identical with killing the other.

FOOT: Since death is imminent for each if nothing is done, then there is no negative-duty obligation to either, and it is reasonable to bring aid to one or to the other. That is where the conflict comes in: to whom does one bring aid? We thus have a conflict of positive duty. Foot avers that we would bring aid to the mother but offers that we might at some subsequent time wish we had done differently.

SECTION III: As with Case I, Foot uses the "imminent death" criterion to absolve negative-duty obligations. But merely because harm will come in any case, can we say that our actions are clearly and merely "aid bringing?" Do we, in effect, not harm the fetus by aiding the mother? That imminent death should change a negative/positive-duty conflict into a positive-duty conflict is not at all obvious. It seems that if we are to absolve ourselves of the negative duty not to harm the fetus (or the mother), it must be on some other ground than that of imminent death.

CASE III.—*It is possible to save the mother by killing the fetus, but standing by insures that the mother will die even though the fetus could then be delivered by postmortem caesarean. The fetus is full-term.*

DDE: We should not intervene, since the death of the fetus could only be strictly intended thereby, although the death of the mother would not be strictly intended.

FOOT: If it were not a fetus but rather a six-year-old child in this case, we could not kill the child to save the mother without other justification. That is, then we would have a clear negative/positive-duty conflict, and unless other principles came to hold sway, negative duty prevails.

SECTION III: If Cases I and II have involved negative/positive-duty conflicts as I have argued, then clearly Case III involves that conflict as well. To aid the mother involves harming the fetus directly. To aid the

fetus involves harm coming to the mother. Resolution must come from weighing other morally relevant factors in the absence of which our duty not to bring injury must stand.

I have not argued that the negative/positive-duty distinction is morally irrelevant, nor have I argued that DDE is after all superior to that distinction. Foot's gas production example still stands in favor of her distinction and against DDE.

What I have argued is that the problem of "closeness criteria" emerges in Foot's application of her distinction in the guise of the problem of imminent death: how close to death must a person be before we lose our negative-duty obligations to them? Foot argued that DDE supporters must decide how close a given foreseeable but not strictly intended consequence can get to what they strictly intend and still not be countable as part of their strict intention. Surely, she asserts, this is a drawback for DDE. I have argued that Foot's use of her own negative/positive-duty distinction involved her decision that in some cases we have a negative duty not to harm while in other cases there would be no such duty, all because of the differing distances of the persons from imminent death. Clearly this is a drawback of at least her application of the negative/positive-duty distinction.

Apparently, then, if we use the negative/positive-duty distinction as one criterion in making moral judgments, allowing that, in general, the negative duty takes precedence, we must judge the weightiness of that criterion's moral relevance not on the grounds of the closeness of death, but rather in contrast with other vying morally relevant considerations.

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The Problem of Abortion and Negative and Positive Duty: A Reply to James LeRoy Smith

PHILIPPA FOOT*

James LeRoy Smith has given an account of my article "The Problem of Abortion and the Doctrine of Double Effect" which is correct except for one or two minor points.¹ He takes exception to the argument I presented, and I shall discuss his objections; I am not clear what his own position is, but perhaps he was not concerned to state a definite point of view.

Apparently he does not want to suggest that my distinction between negative and positive duties (roughly the duty to refrain from harming a man or violating his rights and the duty to give him aid) fails to explain why we are sometimes not justified in choosing the course of action which will result in the least harm or the greatest saving of lives. He agrees that, while we should save five men rather than one man with a drug in short supply, we should not kill one man to get "spare parts" for five; and while we should steer our runaway trolley from a path on which five men are working to a path on which there is only one, we should not hang one innocent person to stop a riot in which five will be killed. And he seems to accept my suggestion that the explanation is to be found in the thought that we have a stricter duty to avoid bringing harm than to bring aid, so that numbers are decisive in a conflict between two negative or two positive duties but not where we have one of each.

I myself have come to be doubtful as to whether this principle gives

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¹ He is wrong, for instance, in thinking that when I said that we would probably choose to save a mother rather than an unborn child, but "later" might decide the matter the other way, I was talking about a change of mind. What I meant was that later on in the child's life we might sacrifice the parent for the child.

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the whole explanation of the matter. One example that I concocted—a rather complicated story about the lethal side effects of the manufacture of a gas designed to save lives—does indeed suggest that the distinction between negative and positive duties will do more for us than its rival, the Doctrine of Double Effect. For as it was not part of the plan that someone should be killed by the manufacture of the gas, by the doctrine of the double effect this harm should not be counted in the same way as harm that is “directly intended.” And there are many examples of this kind. Suppose, for instance, that it were possible to save the lives of several people trapped on a mountainside only by means that would cause an avalanche to descend on some individual in the valley. We would surely not think it right to effect the rescue at such a price, even though the death would be a side effect of our action and not something which was part of our plan. So it does seem that the Doctrine of Double Effect, which does not count harm foreseen but not “directly intended” in the way it counts harm intended for its own sake or for the sake of the good end, will not help us as much as the distinction between negative and positive duties in cases such as these. Nevertheless I am now inclined to think that we need other principles *as well as* the principle that negative duties are in general stronger than positive duties if we are to explain the whole range of cases in which numbers are not decisive, and that one of these principles is close to the Doctrine of Double Effect. In his discussion of my article Smith does not mention its weakest point; namely, my rather cavalier treatment of the case in which someone is deliberately allowed to die in order that his body should be used to save others. I said that we would presumably count this as a case of violating a negative duty, but I did not say how it could be so described given that what we were doing was deliberately withholding aid. Considering this and many other examples, I have come to the conclusion that we cannot ignore the fact that there is a special objection to *using* anyone even for a good end, and that this is a principle independent of the distinction between negative and positive duties—though to be sure most cases in which a man is *used* will involve a violation of negative duty. Nor am I sure that this is the only additional principle required.

However this may be, it is not on such grounds that Smith objected to what I said. What he is worried about is the fact that in spite of my strict doctrine about negative duties I was prepared to say that someone on the brink of an inevitable death, like the fat man stuck in the mouth of the cave whose head was inside the cave and who would therefore be drowned with the others if no action were taken, could be killed in order to save others. The importance of this idiotic example is, of course, that it is a model for one case in which an abortion might be performed: where the child would die whatever we did but where the mother could be saved by aborting the child. Smith argues that even these deaths should be

Philippa Foot

counted as violations of negative duty; or perhaps he only wants to say that I should count them as such. I think that there are indeed good reasons for being strict about cases in which a moribund man is killed for the good of others, partly because this would generally be shortening his life in some significant way (that is, depriving him of *the good of life*) and partly because of the danger of abuse. Nevertheless, it seems to me that no one is injured if he is blown to pieces just before he is about to be drowned; and no child is injured if his life in the womb is shortened. I am not impressed by LeRoy Smith's question as to where I would draw the line in such matters. It has often been remarked that difficulties about where to draw the line can never be used as an argument against the contention that some cases are clearly on one side of it and some on the other. LeRoy Smith speaks as if I myself objected to the Doctrine of Double Effect because there was a difficulty in deciding what was to count as a side effect; but this was not my intent.

I do not, however, feel strongly about LeRoy Smith's suggestion that we should count any case of deliberate killing as a violation of negative duty. The matter is certainly controversial. But he is certainly wrong about one of the examples he uses in trying to show the consequences of my own position. He supposes that since I think it would be permissible to dynamite the fat man out of the mouth of the cave, when he was about to be drowned, I must also think that the judge who wanted to stop a riot could hang as a scapegoat some innocent man whom the mob were already beginning to belabor. He seems not to have noticed that this is quite different from the abortion case or that of the fat man about to be drowned. For there, by hypothesis, the death is not only "imminent" but also inevitable, whereas in his example the death of the mob's victim is imminent but not inevitable, since a judge who could seize and hang him must also be a judge who could seize and save him. If the judge chooses to hang him rather than save him he is using this man to save the lives of the others who will be killed in the riots, and for this reason his action is impermissible.

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Liberal Forensic Medicine

JOSEPH AGASSI*

THE VASTNESS OF THE PROBLEM

The liberal approach to ethics quite naturally tends toward the classic individualistic theory of society, to reductionism or psychologism so-called, that is, to a reduction of all social action to individual action.¹ For example, liberalism allows one to experiment with new medications on one's own body. By extension, liberalism allows one to experiment, it seems, on another person's body with new medication if one acts as the other person's agent, that is, if one has the other person's proper consent. We all know that new medicines are introduced into the market experimentally; indeed, government agencies, such as food and drug administrations, are supposed to supervise such experimentations and eliminate from the market as quickly as possible new (or old) medications that prove harmful. Hence, the very introduction of a new medicine into the market requires the consent of the public—in the form of proper permits to manufacture and market new (and old) drugs and other medications.

Yet, there is a flaw in this description. The act of permission is not made by individual citizens to doctors who act as their agents. As we saw, government agents grant permission to doctors; and even if we assume that both the government and the doctors act as the citizen's agents, the picture is too abstract and remote to be reduced to individualistic theory or to psychologism. In the first place, the individual is ignorant

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¹ The two traditionally competing social philosophies, reductionism and psychologism, encompass vast literatures, and not surprisingly so. From the individualistic viewpoint, the classic historical study is Halevy (1955), a comprehensive contemporary anthology is that of O'Niell (1973), and the contemporary survey of the same is that of Jarvie (1972). For more detailed examination, see Agassi (1975a, 1977). The collectivist literature is more diverse than the individualistic one, and I know of no good survey of it.

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of much that goes in his name, and so his delegation of action is not the same as his own; and in such a situation the individual needs moral rules to guide his conduct as a citizen rather than as a mere individual. For the very anonymity of victims of medical action or inaction raises new moral problems not reducible to individual actions and its delegation (Agassi 1971).

I have in mind such a simple act as inoculation. It is very commonly held, and in my view quite rightly, that any large-scale inoculation is likely to cause some damage, even death, especially in areas where epidemic is usually feared, namely, in dense backward populations. In such populations there is no telling whether there are any people allergic to the serum used, whether sanitary requirements will be fully observed, etc. Accidents will happen. Yet, usually, when an epidemic is predicted with a high enough probability, health departments seldom hesitate to administer inoculation to vast populations in the hope of preventing epidemics and thus saving lives. Even if the epidemic is not of a usually fatal illness, preventing it may save a sufficiently large number of lives to warrant action. Hence, we have here an argument from sheer numbers.

At least we are dealing here with a number of lives against a number of lives; at least we do not weigh the number of lives in gold. Yet in other cases we do, when we publicly spend money on inessentials, whatever these may be and however these may be produced or consumed, instead of producing more ambulances and kidney and heart-lung machines, etc.²

Of course, there is always the argument that we do not really know how many lives will be saved by producing more ambulances and how many lives will be destroyed by the cessation of production of cosmetics—say, by the destruction of the means of livelihood of all those employed in the cosmetic industry. This argument sounds weak. There is the better argument that we all willingly raise to a slight extent the chance of death in exchange for the use of cosmetics. Here the anonymity of those who die from the shortage of ambulances, or from non-life-saving medication, is an essential element in the picture, since it makes the situation a gamble. Yet the first argument may now be restated: how do we assess the odds?

Here, in the second place, we have a factor not reducible to individual interactions. The assessment of the odds, even the very game of chance with lives, cannot possibly apply to small-scale individual interactions. And it also raises in us the problem of social responsibility—as opposed to individual responsibility: it is not a mere problem of numbers,

² This point—that prolonging life must be weighed against social cost—was discussed by George Bernard Shaw in his prefaces to his diverse plays, especially *Doctor's Dilemma* and *Back to Methuselah*.

but also of new kinds of problems, problems of the individual's responsibility toward his society at large, not only to all its members. For, he has the simple duty to consider, however cursorily, the question, what kind of society does he think it is proper to have, one with cosmetics or one whose total effort is devoted to the saving and preserving of lives? And how much effort should be put into this question? Should he put so much effort into it as to have a society devoted to learning and no entertainment?

But, in the third place, social responsibility is not only the individual's duty to his society. As we have noted, the individual in a modern society delegates an enormous portion of examination and decision in matters of his own life and death to social institutions, and these have to be responsible to the individual. The responsibility in question is partly that of the individuals who man these institutions. But this is only a part of the responsibility of institutions. In addition, institutions should be responsible in the sense that they should be so structured or constructed as to enable and even encourage public servants to act in the interests of the individual citizens which the government represents, not only in the interests of the government and its members.

This is no small matter. Any medical practitioner or public servant, in almost any capacity, who has experienced the effects of public institutions on public servants in Western countries and in backward countries, or even anyone who has compared such influences in different Western countries, must have observed this: at times a public institution is so poorly structured that it corrupts or eliminates any official who tries to behave decently or even any official who tries to keep himself within the bounds of the law. Thus, the encouragement to officials to act responsibly, when it takes place, is no mere accident but the outcome of much forethought and planning and organization.

How is this done? How do the citizen and the public servant discharge their duties at all reasonably well? How is the knowledge of the means of the smooth operation procured, and how is the knowledge necessary for the decision-making process procured? Who is to preside over such operations, and how does he discharge his duties?

No doubt, the duties here referred to are both legal and moral. Even were we in possession of knowledge of our relative moral and legal duties, there is always the possibility of a clash between the two. What, then, is a citizen to do? What will he do when his professional ethic, his legal duty, and his sense of justice each pulls him in a different direction?

These are real problems with real examples in the history of medicine, even here and now. I do not pretend for a moment that even those simple and obvious decision procedures that are widely taken to be quite unproblematic are the best or as unproblematic as we would like them to be (Kaufmann 1973).

Yet, some systems work fairly well, and, obviously, some of them are vastly superior to others. This is not to say that we can order them all on one scale: everyone knows that, in some respects, even the worst system is better, however slightly, than the very best we know. Nevertheless, we do prefer some systems over other systems with no hesitation, and the reason for such preference can be articulated and perhaps even utilized for the further improvement of some of our best systems of medical practice.

PRELIMINARY CONSIDERATIONS

I have before me a six-page essay by Irving Ladimer, of the American Arbitration Association, called "Social and Legal Responsibility in Medical Innovation" (Ladimer 1973). I have chosen it because it is concise, because it speaks of innovation—and if we permit no innovation we do not have the problem at hand—and because it clearly distinguishes between the legal and the moral duties placed at the medical man. These qualities make the essay outstanding.

The first moral rule (p. 189) of the medical profession that Ladimer quotes is, naturally enough, "do no harm." This is easier said than done; it is all right as a primary desideratum, but it can and does clash with others. Even the weaker rule—"do not knowingly harm a patient"—which is better, is of a very limited applicability, since we usually increase the chance of harm through neglect, through ignorance, or through ill-luck. Even the still more qualified rule—"do not knowingly harm a patient without warning him"—which is still better, does not signify much; the warning is either too specific or too general. Now, specifically, the patient is no expert and, therefore, he lacks the specific knowledge to comprehend the specific warning and generally he knows that all medicine, as all action, involves some risk or other, and so the general warning is redundant.

The second moral rule (p. 190) which Ladimer presents is, minimize the number of people you put into jeopardy. This does not clash with the first rule only when it is read to say, do not knowingly harm your patient. The second rule should likewise read, minimize risk as best you know how. But risk due to research is of necessity a gamble. Shall we take it? When?

These two moral rules are all too obvious and are seldom even stated, let alone discussed as fully as they deserve. They are trite and they are formulated as trite and unproblematic. Indeed, if anyone finds either of them problematic, we will reformulate them so as to avoid the problem and handle the problem separately.

This, incidentally, is good policy: whenever a rule is reasonably questioned, try to split it into the still unquestioned part and the ques-

tioned part. For, social life depends on consensus, and this is a cheap way to retain some.

Now, the two trite and unproblematic rules already suffice to help us decide against most systems of medicine practiced now in some place or another. This is shocking but obviously true. Most societies do not have the rudiments of public health as practiced in the West, and they are now just introducing them with results so stupendous as to cause the current population explosion that threatens the very continuation of human life on this Earth! Also, most existing public health systems are very poorly organized and manned. For example, most of the medical aid to poor countries, Red Cross, UNICEF, and the like, does not reach its destination due to simple difficulties caused by inefficiency and corruption.

I do not mean to put the two moral rules just mentioned in question. I mean to indicate that even putting to practice a most obvious principle may cause serious problems, perhaps even insurmountable ones.

The third moral rule (p. 190) Ladimer mentions concerns medical research: it should be well done and honestly conducted. The fourth (p. 190) is that of informed consent "of all those who participate in medical research." Again, "as much as possible" should hold for both principles. Anyone involved, even slightly, in any organized academic activity whatsoever, knows how hard it is to conduct it morally. For example, if research would improve by increased cooperation between medical and biological researchers, it is almost certain that enough objection from medical quarters will be whipped up to prevent it. Indeed, it is amazing how little cooperation there is between researchers on the same questions, belonging to different universities or to different schools in the same university, or between medical and nonmedical researchers in general.

I know personally quite a few medical men who know all this to be the case, who are honest, yet who will do nothing whatsoever about it, not even admit it in public. How moral should we get? I do not know, and I do not know whether the advantage accrued by medical research is any compensation for all the unadmitted failings of the system and even of given individuals. I do not say this in order to demand that research stop or even that it improve, but as an argument to indicate the poverty of the blanket demand that research be conducted honestly and well (Agassi 1969). For, if we insist on this demand, we thereby doom all medical research to immediate termination for an indefinite period. Hence, we must make the demand more specific and state it in a more qualified way.

Legal demands, however, are much easier to implement, simply because they are made not in the vacuum that moral demands are usually made but in sufficiently clearly specified institutional terms. We can easily compare a legal and a moral demand in this respect. For example,

the demand for "informed consent" is both moral and legal. Indeed, it occurs in Ladimer's list of moral demands, as we have already noted. It also occurs as his first legal demand. The moral demand, we saw, is very hard to comprehend, since there are so many unresolved questions concerning it (Fletcher 1960, p. 43 and chap. 2). By distinction, the legal demand is quite specific. Indeed, it is specified differently in different countries and places, and so anyone who is in doubt about it simply ought to consult a lawyer. This is not to say that the law is clear enough or good enough; after all, such matters are liable to further improvements, whether by courts or by legislatures.³

But, to return to Ladimer, he adds the simple observation that many doctors violate the legal demand to inform their patients and procure their consent. Now, clearly, they often enough violate both the legal and the moral demand; but, whereas they may, in ethics, try to defend their neglect, legally they simply cannot do so. Does this make their moral defense not good enough, or does it make the law not moral enough? There is no other alternative, I think.

Ladimer himself mentions at once here morally justified illegal conduct of doctors, whether performing an abortion (which is still illegal in many countries) or whether neglecting to inform the authorities regarding clients. Yet Ladimer demands that physicians always respect the law. Does he also forbid doctors from ever speeding on their way to an emergency? I don't really think so, and I think he is quite shoddy on a matter in which he poses as an expert and has influence that could be much better: all he says is that a doctor should be prepared to be punished for breaking the law. But the question is, what should a doctor do if he disapproves of the law, if he sees people dying and can easily save them by breaking the law? How much time and effort should such doctors put in legal reform, and how much in medical practice? Which saves more lives? Who knows? Should he try to find this out?

The second legal requirement Ladimer mentions has to do with legal qualifications. These, obviously, raise questions of medical guild rules. How serious are these? All Ladimer says, again, is, if you break them you may suffer; we all know that.

The third legal demand is to avoid improper and negligent conduct. Again, the law is specific enough. As everyone knows, the law is conducive to neglect through inaction by the avoidance of considerateness. If you are a doctor in a foreign country passing through the scene of an accident, you have a conflict on your hands between the legally commended conduct and the moral one. Ladimer, rather, turns to cases of

³ See Hart (1963), Foucault (1965), and Szasz (1975), for the great progress already accomplished in this respect, unsatisfactory though the present situation still is.

research and of the need for formal consent. He then moves to cases of neglect, on which he says only that they are judged by the local standards of the community. That is true enough, except that the major factor lowering the community's standard is the conspiracy of silence. For, the standard is determined by the most outrageous conduct condoned in courts, and the unwillingness of doctors to testify against colleagues except in extreme cases lowers the standard to what doctors consider extreme cases.

This is an exaggeration: First, doctors' conspiracy of silence can be broken by competent lawyers. Second, the profession often penalizes a member even after having testified in his favor under oath so as to get him off the hook. And, by inflicting such penalties, doctors do raise the standard a bit. Yet doctors could easily raise the standard much more were they honest witnesses. But there may be side effects to this! Will honest testimony only raise the standard or also scare some people out of the profession and make others hardened criminals? I honestly do not know.

Nevertheless, we can note, first, that Ladimer observes fairly correctly what are the most superficial, most preliminary moral and legal requirements from the profession. I think he underplays problems and overplays research (most practitioners have no part in it whatsoever), but he is scarcely in the wrong. It is amazing that with so little, and so ridden with problems, Western medicine went so far ahead of what it was a century or two ago. Of course, research was not only, not even mainly, medical: biologists, chemists, physicists, statisticians, and social thinkers have contributed much to the progress of medical knowledge; and much progress, let us not forget, was introduced in the face of protest from the medical establishment (Slaughter 1961, final 2 chaps.). Nevertheless, the fact remains. Vague and even confused as the rules may be, their commonsensical application to medicine does perform miracles.

Is this all there is to it? Can we honestly conclude that in any place where the stated precepts are adopted by the medical profession the results will be as stupendous? Certainly not.

THE THEORETICAL BACKGROUND: THEORIES OF RATIONALITY

I must leave Ladimer with only half his essay examined. From there on, the quality of his essay is such that I prefer to ignore it. Nor is this peculiar to this one essay. I find the literature particularly wanting because here the mechanics of democratic legislation and democratic implementation of innovations enter, and no student of medical ethics and of research ethics I know has properly noticed, let alone adequately approached, the problem at hand. Nor is this a cause for surprise or

censure: things are not simple in the least, as I wish to briefly indicate now.

The major trend in all Western philosophy which is peculiarly Western is what we broadly call rationalism. And the strange fact characteristic of practically all traditional rationalism is that it is practiced in one way and presented by philosophers in quite a different way. And this accounts for the fact that such study areas as forensic medicine, where practiced rationality seeks theoretical foundations, are in a peculiar jeopardy (Gurwitsch 1957; Husserl 1965; Agassi 1974; Fried and Agassi 1976).

I will go further. Philosophers who theorize about rationality have quite often presented two theories of rationality, known in the current literature by the names of justificationism and critical rationalism (Bartley 1962, chap. 5; Popper 1963; Bartley 1964, p. 21; Agassi 1975b). Justificationism often gets into trouble, and irrationalists often attack rationalism by pointing at the well-known difficulties of justificationism. Quite understandably, rationalists feel that this is cheap and demand that the irrationalist abide, if not by the severe standards of justificationism, at least by the laxer but still decent enough standards of criticism. Hence, even avid justificationists are bound to switch to criticalism rather than stick with justificationism when engaged in combat with irrationalists. In practical matters they tend to do the same, especially since it is in matters of social action that the rationalist is most likely to sit at the same table as an irrationalist (Agassi 1973).

When critical rationalism was at last developed, or redeveloped, by contrasting criticalism with justificationism, some irrationalists and some justificationists, even some former criticalists (Feyerabend 1975, p. 48), have repeatedly pointed out that critical rationalism was never forgotten. The fact which I deem important is that it was often enough too weak to oust justificationism but that now the contrast is clear—due, chiefly, to the philosophical effort of Karl Popper.

I shall state the contrast in one short paragraph and then move quickly to fields of application.

It seems so very obviously rational to give up one's view when that view has been effectively criticized that one hardly bothers to state this. Also, it usually seems to be not enough of a rationality: we usually want not only the justification of our rejections of views, but also and more so the justification of our acceptance of them. Critical rationalism denies that. For the critical rationalist, the act of acceptance, rather than, say, the fact of finding oneself believing in this or that theory, is a rational act insofar as it seems to suit given ends (Jarvie 1964; Agassi 1975a, p. 405); the ends themselves either happen to be accepted or are modifications of previous ends, or ends taken for granted or justified by other ends which

are taken for granted (Jarvie 1964, p. 220). The uncritical rationalist—namely, the justificationist—demands that each acceptance of each view *and* each end should be justified properly by the proper canons of justification. Hence, in particular, though he will endorse the view that criticized views should be rejected, he strengthens it to say even uncriticized views should be rejected unless and until they are justified. Hence, unlike the critical rationalist, the justificationist or uncritical rationalist will hardly bother to criticize unfounded views: often he will deem his critical job performed when he shows a view unjustified. This, of course, raises the question, what are the canons of justification? We do not know. The justificationists are still debating this question. There is also the question, by which canons can we justify the canons themselves? This question is what makes justificationism hopeless to begin with. When a justificationist realizes that his justificationism is in trouble he is willing to shift, *pro tem*, to critical rationalism, in order to save at least rationalism in any shape or form. But he soon reverts to justificationism and forgets or fails to notice that justificationism and critical rationalism are in conflict.

Now, the main field of application of rationalism is the theory of science or of knowledge. Is science justified, and how? The critical rationalists before Popper—from Socrates onward!—either evaded the question or answered it inadequately. Popper has suggested that all theories are unjustified; nevertheless, we prefer better explanations to worse explanations since we wish to comprehend, and we wish them to be testable in order to have a reason to accept them.⁴ The result, says Popper, is that we have some interesting ideas which at times we prove to be false and thus find challenges to seek better ones. This answer is excellent as long as we keep technology quite apart from science (Popper 1970, p. 53). When we come to technology, I think Popper's theory is not acceptable, and I have a better suggestion to offer, I think (Agassi 1975*b*, chap. 12).

For the justificationists, science and technology are one: we apply in practice those theories we know to be true. We know this theory to be false: technology employs theories which are known to be false, whether Galileo's and Newton's mechanics, or classical elasticity which is anti-atomistic. Of course, we have good reasons for doing so, but doing so renders classical justificationism false.

Traditionally, however, philosophers scarcely bothered with rational technology. They did bother about rational ethics, which they viewed as the theory of knowledge of right and wrong, and so their ideal was that of scientific ethics. Strangely enough, they centered on daily interpersonal

⁴ This is the point of Popper's classic "The Aim of Science" reprinted as chap. 5 of Popper (1972).

relations where neither technological complications nor political ones played any role—perhaps because these easy cases were hard enough, perhaps because they felt that, if citizens were morally good, politics would be unproblematic or even perhaps nonexistent.

Not that there is no traditional political theory. Rather, I suppose I can see why it centered on the question: how can we justify political authority? No doubt, answers to this question would, and at times did, suggest which kind of regime the person answering it would favor. But, remarkably, the regime came second to sovereignty: what legitimates the power of the sovereign? Traditionally, two and only two alternative answers were given, nature or convention. Only irrationalists like Edmund Burke claimed the authority of both (O'Gorman 1973; Agassi 1976, pp. 219–20). The naturalist justification was too extreme in that it justified too much: with finality it supported one and only one regime as suitable to human nature (Akzin 1968, p. 231). The conventionalist went too far the other way: he defended any workable regime, or, say, any stable regime. This leads to the cynicism often met in the Department of State and defended by Professor Samuel Huntington of Harvard University: any stable regime, communist, fascist, or whatever, is to be supported (Cairns 1949, pp. 537–38; Huntington 1968, pp. 72–92).

Legal philosophy follows the wake of political philosophy and of the theory of knowledge. It is thus doubly justificationist and narrow. Forensic medicine, then, has hardly a chance when couched against such a poor background. The only consolation it has is that, since justification ethics also rests on a justificationist theory of knowledge, there may be some congruence between forensic medicine and medical ethics. The connection is, naturally enough, human nature. And since conventionalists have little appeal to human nature, it is no surprise that the bias of forensic medicine is naturalist, not conventionalist.

But the regimes we live in, even the best, are not, definitely not, ideally suited to human nature. And so the medical man faces a crisis of conscience with other people's lives in the balance of his decision. Doctors are not to be envied for the unjust moral burden placed on their shoulders. If some of them seem to laymen too callous, this is either (usually) a mask or (in some rare cases, it is to be hoped) the result of a collapse under the heavy burden. And the burden can, indeed, be very heavy. Of course, not every move made by a doctor is either illegal or immoral, and not every such move involves life and death. But even one such case in a year or two may be too much. Even one such case may be too much: a doctor may refuse the unjust burden, use his common sense, and make do as best he can (Szasz 1963).

This, by the way, is exactly what legislatures do from the beginning of parliamentary democracy. They do preach, if and when they philosophize, either a naturalist or a conventionalist theory, but they

practice legal reform. They practice reformism while muddling through, to use George Bernard Shaw's apt expression.

Muddling through, though the best we had, had two major defects. One, it looked definitely anti-intellectual, and even the thinnest anti-intellectualist of guises is soon interpreted by some to be license for violence—moral and political. Two, the idea of muddling through politics, or even in politics as well as in ethics, leaves entirely neglected and unattended the vast and profoundly important field of political ethics.

It is thus no surprise that recently the view that all politics is utterly subject to ethics has been preached all over the West, and with violent means. The paradigm was the Nuremberg trials where Western Allies accepted the claim that, though Nazi atrocities were committed legally, since they were immoral, courts of justice could find their performers guilty. This amounted to saying that any court must accept any conscientious objection to any law and command. Obviously, this is not the intended reading, since the intended reading was regarding obvious immoralities of an obvious monster of a regime (Dinstein 1965), pp. 88–90, 242–52, 253; Falk 1972).

Yet at about the same time when ethics was declared to be capable of overruling all law, a new philosophy of law was forged in England in a debate which H. L. A. Hart of Oxford University launched against Lord Devlin apropos of the celebrated and epoch-making Wolfenden Report (Popper 1945; Wolfenden 1957; Hart 1963; Devlin 1965; Agassi 1974).

Before going to details of the Wolfenden Report, however, let me conclude this section. When all is said and done, the classical liberal philosophy lays responsibility for decisions solely at the door of the individual (Hart 1951; Halery 1955; Hayek 1955). It is thus nearest in spirit to the latest rebellious ideas of utter conscientious objection to anything deemed immoral. This extreme rebellious idea makes excellent sense on the suppositions of justificationist rationalism, especially the one concerning the possibility of infallible moral knowledge. Clearly, once this premise is questioned, and a diversity of moral theories is permitted as rational, though most of them should be false, we see that there must be more to society than that.

ETHICS AND THE LAW

The question the parliamentary commission headed by Sir John Wolfenden was appointed to examine was that of certain victimless crimes, so-called, more specifically, homosexuality and prostitution. It is sheer luck that the victimless crime the commission was particularly studying, namely, homosexuality, turned out—to many people's great surprise—to be an extremely widely practiced one: in Britain, one person in twenty-five, male or female, the commission estimated, is a homosexual, and a

much higher percentage (one psychologist had estimated up to one in three among college students) is at least strongly attracted to homosexuality (Hyde 1970, pp. 11–12). This troubled the British more than the question of victimless crimes. For, it is a sane rule of legislation that a law violated regularly by a considerable portion of the population should be better enforced or repealed.

I mention this because it is of great significance both in medical ethics and in forensic medicine, where debates about legal abortion persist and will persist for quite a while. Many debate the question, is abortion a victimless crime or is the fetus a legally rightful or a morally rightful victim? But here the more urgent issue is the widespread incidence of illegal abortion in many countries which corrupts young women, doctors, unlicensed abortionists, and many others (Packer 1968, pp. 151–52; Zinberg and Robertson 1972).

To return to victimless crimes, there is no doubt that they constitute a specific category even in the popular mind. In the United States, organized crime, the greatest menace to civil society there, feeds on drugs—at times alcohol, at times cannabis—gambling, and prostitution, where and when they are criminal by law. This is so because the public cooperates with them. The public thus exhibits a conflicting attitude toward these acts; they are both desired and undesired; the public both wants them illegal and wants to practice them. It wants them illegal in order to curb them, even though it knows laws can be broken, and oft are broken. The population at large accepts this situation even though it knows that organized crime is thus thrown into the bargain, including gangland warfare and all that goes with that. Is that wise?⁵

Lord Devlin rendered a service when he bluntly took a philosophic uncompromising view. He took a democratic conventionalist view and said, never mind whether homosexuality is evil, or whether I think it is evil (it is not, and he did not think it is); what matters is that the public detests it and wants it banned and has the right to legislate against it. And, in reply to this, H. L. A. Hart took a new stance, though one adumbrated by Karl Popper: laws are there to be improved and made to better accord with our moral code.⁶

The question remains, in the meantime, what is a practitioner to do when the law and his conscience conflict?

⁵ The fact that at times the majority votes to prohibit practices in which the majority engage is hardly noticed in the literature. See Waninger (1958); Room (1976), who refers to Waninger as a classic and who notices the difficulties involved; Silberman (1976).

⁶ Devlin's uncompromising position is stated "immorality then, for the purpose of the law, is what every right minded person is presumed to consider immoral." Yet, careful reading may find all sorts of qualifications.

The traditional liberal attitude is not good enough. As we have seen in the beginning of this essay and again a few paragraphs ago, the traditional liberal view centers on morality and wishes the law to reflect nothing but morality, to be so limited as to have hardly a chance to conflict with ethics, etc. This is sheer utopia. Indeed, both the liberal utopia, which leaves all decisions to the individual, and the collectivist (Platonist) utopia, which leaves all decisions to the State, are so unrealistic as to be utterly useless. As we have seen, at least one writer on forensic medicine—and one of the best, I think—can tell doctors nothing more than that if they break the law they may suffer the consequences. Doctors' conspiracy of silence apart, this is an obvious truth which is hardly a guide to a doctor, especially a researcher, who has a moral-legal conflict on his hands.

The moral-legal conflict can be presented dramatically for rather rare cases. It can be put less dramatically for cases of victimless crimes such as drug taking and euthanasia. It can be put even less dramatically to apply to common everyday matters such as prescription of medicine by unauthorized persons. Everyone with hospital experience knows that it is both forbidden and demanded of nurses to prescribe and administer such drugs as painkillers, sleep inducers, sedatives, tranquilizers, emergency injections of all sorts, etc. Everyone even slightly sensitive to nurses' plights must notice the hardship this double bind creates for them and the opportunities it opens for cruelty to them by all and any of their supervisors. But enough of that.

There is no doubt that every citizen may have at times the opportunity to be torn between law and morality. And, no doubt, in such cases the democratic straight rule is, be honest and if need be, be damned, or even be honest and be damned anyway. But this straight rule conflicts with other, equally straight rules, such as that one has duties to kith and kin and colleagues and underlings, and that one should not escape these by cavalierly going to jail.

Here the double-bind is no small matter. The law is no help, since it is one form of a dilemma. So is custom or received moral opinion. And so the individual citizen has to decide, on the grounds of both principle and expediency, when it is not just cavalier to go to jail. Yet, on the whole, no one can ask of another to go to jail except in such extreme cases, perhaps, as when forced to commit Nazi atrocities.

Nevertheless, members of the medical profession can and perhaps should try to liberalize the law, so as to abolish all victimless crimes, and permit euthanasia. In principle, the law should not be made a means of exercising control but of enabling people to exercise their responsibilities.

This, however, covers only a small part of medical praxis. Quality control of medications, for example, old or new, is no small matter, and we have not touched upon it yet. More generally, I think we can first

develop a view of social responsibilities of individuals and then of institutions.

The first principle of the social responsibility of the individual seems to me to be that of the delegation of authority: when you perform a service for me, I have to commission it. And if it is my responsibility, then I am not absolved of it unless I have successfully delegated it to a responsible person. And, finally, I can delegate the task of examining people for their competence and responsibility to professional examiners (Agassi 1971).

So far so good. Except that the professional examiner must be put under democratic examination and control (Feyerabend 1976, p. 189). And in medicine this seldom is the case. This explains why only public scandals lead to significant changes. But, clearly, at least some public scandals are easily predictable, and at least in these cases it is wise, and desirable for all parties involved, to begin proceedings toward significant reform long before the scandal explodes. Why, then, is this not done? The answer is complex. First and foremost, there are no institutions to this end. Second, often a scandal is caused simply by efforts to bring an issue to the public eye—at times even in cases where medical ethics and forensic medicine violently clash, for example, the situation which Good Samaritan legislation came (in vain) to remedy. Third, most people do not pay heed to prediction, out of ignorance and out of complex social conditions.

Yet, clearly, here lies the future of all wise technological legislation, including, in particular, legislation regarding what is acceptable medical practice.

To conclude, ethics and the law clash regularly, and legislation is the attempt to close the gap—at times unsuccessful, at best partly successful. This is the starting point, I propose, of all serious study aiming toward the development of better and more liberal forensic medicine.

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Commentary on the Essay of Joseph Agassi, "Liberal Forensic Medicine"

ERIC J. CASSELL*

In his essay, which uses medical examples, Joseph Agassi points out once again how difficult it is to lead the moral life. He underlines not the usual reasons of uncertainty and temptation but, rather, the fact that a moral precept may conflict with a law (a situation not unique to medicine). Moral precepts, it is my understanding, are not rules to be followed with computer precision but, rather, goals to be approximated. And those goals are to be found not only in this or that of my actions, but in my being. Moral precepts are not only to insure that I do not harm fellow humans but, rather, that I do not harm myself. The function of laws would seem to be different. Laws regulate social institutions, an end that Agassi points out would be poorly served by individuals responding in aggregate to individual interpretations of moral precepts. On this basis, Agassi criticizes the liberal view of ethics because such an individualistic view of the moral agent does not insure that social practices or the practices of social institutions will, in fact, be moral. That seems a reasonable theme worth expressing clearly, directly, and in depth (which this paper does not do).

But why choose an essay on medicine to make this point? Philosophers may use a medical example to illustrate a point in philosophy or to illuminate some general principle. For such purposes, the fact that medicine is being discussed is secondary. In which case, facts can be invented, and names of things pulled from air—as long as the reader knows what is being done. Why is this essay called "Liberal Forensic Medicine"? What does it mean? There is a field of medicine in the service of the law in which are found medical examiners, coroners, toxicologists, and the like, but I can find no explicit relationship between

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that specialty (called forensic medicine) and Agassi's essay, and he does not say that only a general point is being made in the service of which he wants to invent a fantasy name and a fantasy medicine.

On the other hand, philosophers may address questions that are central to medicine, and from their reflections both medicine and philosophy may be expected to benefit. But then the accuracy of their medical information becomes important. The facts must be correct. Medical maxims, moral precepts, or established medical precepts that are examined have to be properly quoted (even referenced to early sources) and maintained in context.

Here Agassi fails. Quoting Irving Ladimer, a recent writer, he examines the age-old maxim "do no harm" and finds it trite. But why would medicine respect so highly and for so long a trite maxim? Agassi remains superficial and even silly because he disregards what ought to be a maxim for philosophers: do not philosophize about the profession of others unless you respect the profession and its practitioners. Where there is respect, there will always be caution.

The maxim is not "do no harm" but, rather, "above all [or, first] do no harm" (*primum non nocere*). Medicine is a profession of action—doctors do things to their patients in the hope of making their patients better. The more serious the patient's affliction, the greater are the pressures to act. But, as the first aphorism of Hippocrates makes clear, the basis for action may become more tenuous, the more urgently action is demanded. "Life is short and the Art is long" suggests that there will be situations where the physician's knowledge will be inadequate, simply from lack of experience. But experience itself may be an inadequate basis for action, because (the aphorism says), "experience is fallacious." (The other common interpretation of the phrase "experiment perilous" does not offer much comfort either.) The other parts of the aphorism also stress how difficult decision making is. "The occasion fleeting" makes clear that one cannot speculate endlessly on what to do because when the decision must be made, that's when it must be made and not some time in the future. ("Judgment difficult" speaks for itself.) What should one do in instances where a mounting pressure exists to do something, but the basis of action is uncertain? And where it follows that the greater the perceived danger to the patient, and the more necessary action seems, the less tolerable will uncertainty be. But further, the more action is demanded, the larger even minor uncertainty will loom. *Do no harm*. Generally speaking, one may not know how to act in order to make a patient better, but the physician will know what is required not to make the patient worse. What is usually required is that the doctor do nothing. And doing nothing requires considerable discipline. Further, it seems to be true that younger physicians are more prone to do things than simply to wait, while older physicians have learned how to restrain

themselves. This point is commented on by Thomas Percival in his treatise on medical ethics, but has, I am sure, been discussed by every generation of physicians before and since Percival (1927).

"Above all do no harm" is not trite. Agassi, as a philosopher of medicine, might have commented on whether malpractice law encourages action or restraint, and whether it is in conflict or support of the moral precepts that are applicable. Agassi might have done that, and moved medicine forward as well as illustrating the general question, but, unfortunately, he did not.

One further note. Parts of this essay have an angry tone. There is something about medicine that seems to stimulate the spleen in an occasional commentator. I suppose that is true of the law and the clergy—to say nothing of the big corporations. When done with wit and erudition, everyone benefits (though time may pass before the benefit is appreciated). But here? Medicine is a complex human behavior arising from a fundamental need based in the frailties of the body. It is a patchwork of science and morality, of high technology and unexamined custom. Physicians have always lived in a sea of doubt, but at this unique time in the long history of medicine, they know they need guidance from philosophy. But philosophy also needs medicine in order to break free of stale convention. If philosophy really pays attention to problems in medicine, then medicine will lead philosophy a merry dance. And about time, too—for both of them.

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The following is an update of the courses I have taken/audited since licensing or since my original papers were turned in.

The Christian Experience with Good and Evil
New York Theological Seminary
Passed (1975, Spring term)

The Early Church Fathers
N.Y. Institute for Theology (Episcopal Diocese)
Passed (1975, Fall term)

Homiletics
N.Y. Institute for Theology
Passed (1975, Fall term)

Introduction to Theology
Institute for Christian Studies
Boston, Mass.
Non-credit, no exam.

Christian Ethics
Institute for Christian Studies
Boston, Mass.
Non-credit, no exam.

Introduction to Counseling Methods
Rhode Island College
Providence, R.I.
Audit

Introduction to Social and Rehabilitation Counseling
Rhode Island College
Providence
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Other Graduate level courses, not on transcripts

Remedial Reading Diagnosis
Yeshivah University
Ferkauf School of Graduate Studies
Fall 1973 - B+

Sociology of Deviance and Social Conflict
Brooklyn College Graduate School of Education
Spring 1974 A

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